91-1986

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

TRUMP TAJ MAHAL ASSOCIATES, et al.,

Petitioners,

v.

COSTRUZIONI AERONAUTICHE GIOVANNI AGUSTA S.p.A., et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether an entity indirectly owned by a political subdivision of a foreign state is an agency or instrumentality of the foreign state entitled to remove a lawsuit from state court to federal court under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 *et seq.* (1986) and whether subject matter jurisdiction over a civil action against such an entity will lie in the absence of complete diversity or other basis of federal jurisdiction?

2. Whether, under the authority of *Salve Regina College v. Russell,* 111 S.Ct. 1217 (1991), a Court of Appeals confronted with a difficult or unsettled question of state law may discharge its duty of *de novo* review by declining to make its own independent review, in effect deferring to the district court's determination of state law?

3. Whether a federal court interpreting state law violates the constitutionally mandated rule of *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938) and its progeny when it disregards relevant pronouncements of the State's highest court and other available sources of state law, including considered dicta?

4. Where a Court of Appeals is unable to find a basis in state law upon which to base a prediction "with any degree of certainty" that the highest state court would recognize the legal entitlement to recovery pleaded, and where state certification procedures are not available, should the Court of Appeals remit the question to state court, where the action was originally commenced, so that an authoritative ruling may be supplied?

PARTIES TO THE PROCEEDING BELOW

The following persons and entities were parties before the United States Court of Appeals for the Third Circuit: Trump Taj Mahal Associates, Trump Castle Associates, Trump Plaza Associates, and Helicopter Air Services (appellants); Costruzioni Aeronautiche Giovanni Agusta S.p.A., Gruppo Agusta, Agusta Aviation Corporation a/k/a Agusta Aerospace Corporation, and Paramount Aviation, Inc. (Appellees).

Trump Taj Mahal Associates is a limited partnership organized and existing under the laws of the State of New Jersey, consisting of a general and limited partner, Donald J. Trump, and a corporate general partner, Trump Taj Mahal, Inc., a New Jersey corporation. Trump Castle Associates is a limited partnership organized and existing under the laws of the State of New Jersey, consisting of a general and limited partner, Donald J. Trump, and a limited corporate partner, Trump Castle Hotel & Casino, Inc. Trump Plaza Associates is a general partnership organized and existing under the laws of the State of New Jersey, consisting of Donald J. Trump and Trump Boardwalk Realty Corporation. Helicopter Air Services, Inc. is a Delaware corporation.

Costruzioni Aeronautiche Giovanni Agusta S.p.A. is a corporation formerly organized and existing under the laws of the Republic of Italy, which apparently was merged into Agusta S.p.A. in November, 1988. Agusta S.p.A. is owned by Aviofer Breda S.p.A., which is owned by MCS S.p.A., which in turn is controlled by Ente

PARTIES TO THE PROCEEDING BELOW – Continued

Partecipanzione e Finanziamento Industria Manifatturiera, a state agency directly responsible to the Italian Ministry for State Participation. Gruppo Agusta is an acronym for the total Agusta aviation operations, and is alleged to be a legal entity involved in the manufacture and sale of military and civilian aircraft worldwide. These entities do business in the United States through their wholly-owned subsidiary, Agusta Aviation Corporation a/k/a Agusta Aerospace Corporation, which is a Delaware corporation.

Paramount Aviation, Inc., the remaining party, is a New Jersey corporation.

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OPINIONS BELOW

The final order of the United States Court of Appeals for the Third Circuit, on petition for rehearing (per William D. Hutchinson, J.), appears in the appendix to this petition (App. 1a-2a), as well as the judgment order of the Court of Appeals (per William D. Hutchinson, J.) (App. 3a-6a). Also appearing in the appendix is the decision and order of the United States District Court for the District of New Jersey (John F. Gerry, D.J.) denying petitioners' motion for remand and granting respondents'

motions to dismiss and for summary judgment (App. 7a-60a).

The decision affirming the district court is reported, without published opinion, at 958 F.2d 365 (3d Cir. 1992). The final decision on rehearing has not been reported. The order and accompanying opinion of the district court has been reported at 761 F. Supp. 1143 (D.N.J. 1991).

JURISDICTION

On March 12, 1992, the United States Court of Appeals denied petitioners' petition for rehearing of the judgment entered on February 12, 1992. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1) (1986).

STATUTES INVOLVED

The following provisions of the Foreign Sovereign Immunities Act appear in the appendix: 28 U.S.C. § 1441(d) and 28 U.S.C. § 1603(a) and (b) (App. 61a-62a).

STATEMENT OF THE CASE

On July 3, 1990, Trump Taj Mahal Associates, Trump Castle Associates, Trump Plaza Associates, and Helicopter Air Services, Inc. ("Trump") filed a complaint in the Superior Court of New Jersey, Atlantic County, Law Division against Costruzioni Aeronautiche Giovanni Agusta S.p.A., Gruppo Agusta, Agusta S.p.A., Agusta Aviation

Corporation a/k/a Agusta Aerospace Corporation (the "Agusta defendants"), who were alleged to be involved in the design, manufacture, and sale of a certain Agusta A109 helicopter, and Paramount Aviation, Inc., the operator of this aircraft. The complaint, which alleged, *inter alia*, counts for tortious interference with contractual relations, fraud, breach of warranty, tortious spoliation of evidence and breach of an agreement to preserve trial evidence, sought recovery for all economic losses suffered as the result of a fatal helicopter crash in Lacey Township, New Jersey on October 10, 1989, including loss of services, lost profits, and all sums paid to or in behalf of the estates of Trump's deceased employees by virtue of contractual obligations and worker's compensation.

Agusta S.p.A. filed a notice of removal to the United States District Court for the District of New Jersey claiming that it was an agency or instrumentality of a foreign sovereign entitled to remove under 28 U.S.C. § 1441(d). On that same date, the Agusta defendants moved to dismiss on the basis that the complaint failed to state claims under New Jersey law upon which relief could be granted. Paramount Aviation, Inc. subsequently filed an application for joinder in the Agusta defendants' motion to dismiss the complaint.

Trump filed a motion for remand and for stay of the proceedings, requesting that the entire matter be remanded to the Superior Court of New Jersey because (1) Agusta S.p.A. was not an entity entitled to remove under 28 U.S.C. § 1441(d); and (2) as the law existed at the time of removal, the entire action could not have been brought in federal court originally because there was no basis of federal jurisdiction over the nondiverse pendent

party, Paramount Aviation, Inc. (a resident of New Jersey, the forum). Trump also opposed the motions to dismiss, pointing to decisions by the New Jersey Supreme Court which permit recovery for the economic losses alleged to have been sustained here.

After entertaining oral argument, the district court denied the motion for remand and for stay of the proceedings and granted the motions to dismiss the common law claims for economic losses. The court converted the motions to dismiss the statutory claims for reimbursement of worker's compensation benefits to motions for summary judgment, and likewise granted those motions. In reaching this result, the district court declined to follow two decisions of the New Jersey Supreme Court, characterizing the holding in one case, *Interstate Telephone & Telegraph Co. v. Public Service Electric Co.*, 86 N.J.L. 26, 90 A. 1062 (Err. & App. 1914), as dicta and distinguishing it because the Trump executives died as the result of their injuries (App. 39a, 40a). The district court rejected the second New Jersey Supreme Court case, *United States Casualty Co. v. Hercules Powder Co.*, 4 N.J. 157, 72 A.2d 190 (1950), because it found that Trump was not the purchaser of the helicopter and therefore was not in privity with the defendants (App. 41a), even though privity has not been a prerequisite to maintaining a breach of warranty action under New Jersey law for more than three decades.

The dismissal of the complaint for failure to state claims under New Jersey law was appealed to the United States Court of Appeals for the Third Circuit. Trump also sought appellate review of the propriety of the removal of this matter from the Superior Court of New Jersey,

Atlantic County, Law Division to the United States District Court for the District of New Jersey and the denial of the motion for remand.

The Court of Appeals "conclude[d] that the Italian government's indirect ownership of Agusta S.p.A. sanction[ed] removal from state to federal court" (App. 4a). In affirming on the merits, the Third Circuit stated:

> [A]ppellants rely in substantial part on dicta in *Interstate Telephone & Telegraph Co.*, 90 A. 1062 (N.J. 1914), stating that an employer may recover against a third party for the loss of its employee's services, and *United States Casualty Co., v. Hercules Powder Co.*, 72 A.2d 190 (N.J. 1950), stating that an employer may bring a breach of warranty action which it has in its own right against a third party where such breach results in its employee's injury of death. . . .

(App. 4a-5a). Although finding that language in these cases was "supportive of appellants' position" (App. 5a), the Third Circuit nevertheless was "unable to predict with any degree of certainty that the Supreme Court of New Jersey would recognize an employer's cause of action for economic damages it suffers when a key employee dies as a result of the acts of a third party" (App. 5a). The Court of Appeals "therefore affirm[ed] the judgment of the district court in all respects essentially for the reasons set out in its opinion. *See Trump Taj Mahal Assocs. v. Constuzioni Aeronautiche Giovanni Agusta, S.p.A.*, 761 F. Supp. 1143 (D.N.J. 1991)." (App. 5a).

REASONS FOR GRANTING THE WRIT

This case raises a question of first impression before the Court concerning the parameters of section 1603(b) of the Foreign Sovereign Immunities Act, which defines an agency or instrumentality of a foreign state subject to the protections of that statute to include "an organ of a foreign state or a political subdivision thereof, or [an entity where] a majority of shares or other ownership interest is owned by a foreign state or political subdivision thereof." 28 U.S.C. § 1603(b)(2). The Court has not previously had occasion to address the scope of this statutory ownership interest, such as whether an attenuated chain of ownership or indirect ownership will satisfy the requirements of the statute, nor have the lower courts provided insight on this question. This issue is of paramount importance to this case because subject matter jurisdiction turns on satisfaction of the statutory requirement of a majority ownership interest.

Moreover, compelling issues apart from subject matter jurisdiction abound. There are two decisions and two decisions only from the highest court in the State of New Jersey – *Interstate Telephone & Telegraph Co. v. Public Service Electric Co.*, 86 N.J.L. 26, 90 A. 1062 (Err. & App. 1914) and *United States Casualty Co. v. Hercules Powder Co.*, 4 N.J. 157, 72 A.2d 190 (1950) – which address the common law right of recovery for economic losses sustained in petitioners' favor. Had this matter remained in state court or had petitioners' motion for remand been granted, both the trial court and the intermediate appellate courts of New Jersey would have been bound by the New Jersey Supreme Court's pronouncements in *Interstate Telephone* and *Hercules Powder*. Petitioners, however, are out of court

because the district court was disinclined to follow these two decisions and the Court of Appeals found itself unable to make, "with any degree of certainty," its own prediction of state law, thus rubber-stamping the district court's erroneous state law determinations.

This result is not only inconsistent but is inherently unfair. Petitioners' desired forum, the state courts of New Jersey, was taken from them when this case was removed to the District of New Jersey. By declining to predict what the New Jersey Supreme Court would do in this situation, the Third Circuit has both encouraged forum shopping and has engendered a result-determinative conclusion to this litigation. The federal appellate courts, however, were instructed in *Salve Regina College v. Russell*, 111 S. Ct. 1217 (1991), that state law determinations are to be reviewed *de novo*, thereby charging the courts of appeals with the responsibility for determining the applicable state law. The Third Circuit, by failing to make its own state law determinations, has in effect deferred to the district court's erroneous conclusions of law, contrary to the mandate of *Salve Regina College*.

This case also presents an opportunity for the Court to address a number of related issues which will assist the federal appellate courts in discharging their duty of *de novo* review under *Salve Regina College*. In situations where a state's highest court has made a recent ruling directly on point, the federal courts have had little difficulty in applying the *Erie* rule. Where the highest court has not spoken recently, or its declaration of state law is dicta, the federal courts have struggled in their efforts to interpret state law.

The Court has yet to express a definitive statement of the process to be followed in ascertaining state law, such as those factors to be considered in the absence of a recent holding by the highest state court, and the weight and priority to be afforded each such consideration. Moreover, in a situation where, as here, a reviewing court finds itself unable to ascertain state law, the desirability of certifying or remitting such difficult questions to the state courts becomes an issue of far-reaching importance. The Court has cautioned the federal courts to accept the responsibility for deciding questions of state law necessary for resolution of cases brought in for decision yet, at the same time, has encouraged resort to state certification procedures, where appropriate, for purposes of judicial economy and building a cooperative federalism. The questions of certification, the practice of remitting the parties to state court to resolve unsettled questions under controlling state law and/or abstention are ripe for reconsideration in light of *Salve Regina College*.

De novo review is meaningless if no review takes place. The decision of the Third Circuit accordingly strikes at the underpinnings of federal jurisprudence. Federal litigants, whether in the federal courts by choice or as the result of removal, should not be subjected to justice by default because a reviewing court surrenders its responsibility to decide state law claims – regardless of how difficult or uncertain such determinations may be. In its decision, the Third Circuit, it may truly be said,

> has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of the court's power of supervision.

Sup. Ct. R. 10.1(a).

I. THE COURT'S GUIDANCE IS NEEDED CONCERNING THE OWNERSHIP INTEREST NECESSARY FOR A CORPORATE ENTITY TO BE AN "AGENCY OR INSTRUMENTALITY OF A FOREIGN STATE" AND CONFERING JURISDICTION IN THE FEDERAL COURTS.

Agusta S.p.A. removed from the Superior Court of New Jersey to the District of New Jersey under section 1441(d) of the Judicial Code, which allows for removal of civil actions brought in state court against a foreign state as defined by section 1603 of the Judicial Code. *See* 28 U.S.C. § 1441(d) (1986). The Third Circuit, in affirming the district court, concluded that "indirect ownership" by a foreign state was sufficient for removal under the Foreign Sovereign Immunities Act (the "Act") (App. 5a). The removal by this indirectly owned entity presents a question never addressed by the Court – the scope of ownership interest sufficient to invoke the protections of the Act.

An agency or instrumentality of a foreign state must meet a three-pronged test under section 1603(b). The second element, that the entity be "an organ of a foreign state or a political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof," 28 U.S.C. § 1603(b)(2), is the subject of the controversy here.

Federal court decisions interpreting section 1603(b)(2) are few and far between. For example, the United States Court of Appeals for the Second Circuit has addressed this provision in *O'Connell Machinery Co. v. M.V. "Americana"*, 734 F.2d 115 (2d Cir.), *cert. denied*, 469

U.S. 1086 (1984), a case the district court found to be analagous to the case at bar (App. 22a). The defendant shipping line in *O'Connell* was controlled by a governmental unit ("FINMARE"), which in turn was under the control of another governmental entity ("IRI"). The Second Circuit concluded that two-tiered ownership did not defeat foreign state status. 734 F.2d at 116.

Here, Agusta S.p.A. is not directly owned by the political subdivision itself. Rather, Agusta S.p.A. is controlled by a private commercial enterprise (Aviofer Breda S.p.A.), which is owned by another commercial enterprise (MCS S.p.A.), which is owned by EFIM, the state-owned entity. There is no dispute the Italian government, through EFIM, clearly has some degree of involvement with Agusta S.p.A – and all of the other Agusta defendants, for that matter. The Third Circuit, however, found such indirect ownership to suffice.

Nevertheless, while the Second Circuit has found two-tier ownership to be sufficient and the Third Circuit has sanctioned an even more attenuated chain of ownership, the clear statutory language mandates direct ownership by the sovereign or subdivision. Just as importantly, there are no policy reasons which support this expansive reading of the statute. The actions of Agusta S.p.A. in the United States, including the sale and distribution of the helicopter which forms the basis of its liability here, are attributable to Agusta Aerospace Corporation, its wholly-owned American subsidiary which, although next in the Agusta chain of ownership, is not subject to the Act because it is a Delaware corporation. In fact, if Agusta Aerospace Corporation alone had been sued as a party defendant, not only would there have been no basis for

the application of the Act but there would have been no basis of subject matter jurisdiction because this party and Helicopter Air Services are both Delaware corporations. This being so, what possible rationale would extend the statute where the conduct complained of is performed by an American corporation in this country? Nothing in the statute nor the legislative history indicates that this is what Congress intended. Petitioners request that the Court entertain this important question.

II. THE DEFERENCE AFFORDED THE DISTRICT COURT'S STATE LAW DETERMINATIONS IS INCONSISTENT WITH THE APPLICABLE STANDARD OF REVIEW AND IN CONFLICT WITH THE COURT'S DECISION IN *SALVE REGINA COLLEGE V. RUSSELL*, 111 S. CT. 1217 (1991).

The decision of the Third Circuit is in conflict with the recent holding of the Court in *Salve Regina College v. Russell*, 111 S. Ct. 1217 (1991). By rejecting a rule of deference for plenary review, the Court concluded that "[t]he obligation of responsible appellate review and the principles of a cooperative judicial federalism underlying *Erie* require that courts of appeals review the state-law determinations of district courts *de novo.*" *Id.* at 1221.

The Court of Appeals here has, for all intents and purposes, deferred to the district court's state law determination by declining to make its own independent determination of state law. The Court of Appeals was required to review *de novo* the district court's determination that, as a matter of New Jersey law, there was no

common law right of recovery for economic losses suffered and that actual notice of claims for worker's compensation benefits paid was insufficient notice under the worker's compensation statute. *Salve Regina College,* 111 S. Ct. at 1221, 1225. By declining to make a prediction and instead deferring to the district court's interpretation of New Jersey law,[1] the Court overlooked or misapprehended its obligation to make a *de novo* determination of the law of New Jersey under *Salve Regina College.*

Review also is necessary to consider the general due process and equal protection implications of the Court's

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[1] The somewhat suspect interpretation of New Jersey law embodied in the district court's opinion underscores the need for responsible plenary review. For instance, the district court distinguished, and ultimately rejected, the decision of the New Jersey Supreme Court in *United States Casualty Co. v. Hercules Powder Co.,* 4 N.J. 157, 72 A.2d 190 (1950) because Trump was not the purchaser or ultimate user of the helicopter and was not in privity with the defendants (App. 41a). The requirement of privity as a basis for a breach of warranty action was rejected by the New Jersey Supreme Court over thirty years ago in *Henningsen v. Bloomfield Motors, Inc.,* 32 N.J. 358, 384, 161 A.2d 69, 84 (1960).

The district court's predictions as to matters of first impression under New Jersey law, on the other hand, were not unfailing. The district court dismissed the cause of action for tortious spoliation of evidence for failure to state a claim under New Jersey law (App. 52a-53a), yet six months later, in *Viviano v. CBS, Inc.,* 251 N.J. Super. 113, 597 A.2d 543 (App. Div. 1991), *certif. denied,* 1992 N.J. LEXIS 179 (N.J. 1992), the Superior Court of New Jersey, Appellate Division embraced this very cause of action.

holding that even though there are decisions of the highest court in New Jersey supportive of petitioners' position, it was unable to predict New Jersey law, and would not do so (App. 4a-5a). Petitioners have been deprived of meaningful review of their state law claims solely because this case was adjudicated in a federal forum, a result which runs contrary to principles of comity, as well as one of the primary considerations behind the *Erie* doctrine – a concern that rights would vary according to whether enforcement was sought in the state or federal courts, *Erie, supra,* 304 U.S. at 74-75, which "rendered impossible equal protection of the law." *Id.* at 75.

The same considerations govern the case at bar, even though jurisdiction was not, as in *Erie,* grounded in diversity. The Court was mindful of these policy reasons when it rejected a deferential standard of review in *Salve Regina College:*

> [A]ppellate deference to the district court's determination of state law is inconsistent with the principles underlying this Court's decision in *Erie.* The twin aims of the *Erie* doctrine – "discouragement of forum-shopping and avoidance of inequitable administration of the laws," *Hanna v. Plumer,* 380 U.S. 460, 468, 85 S. Ct. 1136, 1142, 14 L.Ed. 28 (1965), – are components of the goal of doctrinal coherence advanced by independent appellate review . . . [D]eferential appellate review invites divergent development of state law among the federal trial courts even within a single state. . . . Moreover, by denying a litigant access to meaningful review of state-law claims, appellate courts that defer to the district courts' state-law determinations create a dual system of enforcement of state-created rights, in

> which the substantive rule applied to a dispute may depend on the choice of forum. *Cf. Erie*, 304 U.S., at 74-75, 58 S. Ct., at 820 ("The rule of *Swift v. Tyson*, 16 Pet. 1, 10 L.Ed. 865 (1842) made rights enjoyed under the unwritten 'general law' vary according to whether enforcement was sought in the state or in the federal court"). Neither of these results, unavoidable in the absence of independent appellate review, can be reconciled with the commands of *Erie*.

111 S. Ct. at 1222.

"When *de novo* review is compelled, no form of appellate deference is acceptable." *Salve Regina College*, 111 S. Ct. at 1224. The Court should review the deference afforded the district court's determination of New Jersey law.

III. THE THIRD CIRCUIT HAS PASSED UPON QUESTIONS OF STATE LAW IN A WAY THAT CONFLICTS WITH APPLICABLE DECISIONS OF THE COURT, DEMONSTRATING THE NEED FOR A DEFINITIVE STANDARD TO BE APPLIED BY THE FEDERAL COURTS IN MAKING STATE LAW DETERMINATIONS.

In addition to running afoul of *Salve Regina College*, the judgment of the Third Circuit conflicts with applicable decisions of the Court on the related questions of the roles of *stare decisis*, dicta, and lower court decisions in making an "*Erie* guess."

One question presented by this case is whether decisions of the highest court of a state, when neither expressly overruled nor discredited in recent holdings,

may be disregarded by the federal courts. Put another way, are New Jersey decisions from 1914 and 1950 binding on the federal courts in 1992?

This question was addressed in *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956), in which one of the issues before the Court was whether a forty-six year old Vermont decision holding arbitration agreements to be unenforcible was binding. The Court concluded that the decision was controlling, finding that "there appears to be no confusion in the Vermont decisions, no developing line of authorities that casts a shadow over the established ones, no dicta, doubts or ambiguities in the opinions of Vermont judges on the question, no legislative development that promises to undermine the judicial rule." *Id.* at 277.

Here, the holdings of the New Jersey Supreme Court have remained undisturbed for decades. The only intermediate New Jersey court which had occasion to address the viability of either decision acknowledged the continuing viability of the *Hercules Powder* case, although it declined to apply that case to the situation before it. *Multiplex Concrete Co. v. Besser Co.*, 153 N.J. Super. 531, 534, 380 A.2d 708, 710 (App. Div. 1977), *certif. denied*, 75 N.J. 607, 384 A.2d 837 (1978). Under the authority of *Bernhardt*, where there has been no shadow cast by a developing line of authorities to the contrary, the Court of Appeals was bound to follow *Interstate Telephone* and *Hercules Powder*.

Another question presented is the role of dicta in the state law determination. The language the Third Circuit found "supportive of [petitioners] position" was brushed

aside by the district court as "dicta" (App. 39a). The Court, however, has recognized that dicta plays a considerable role in assisting the federal courts in their review and determination of state decisional law. Considered dicta by the state's highest court may also provide a federal court with reliable indicia of how the state tribunal may rule on a particular question. *Nolan v. Transocean Air Lines*, 365 U.S. 293, 295-96 (1961). In fact, *Erie* did not instruct the federal courts to only apply holdings by the highest state court on all fours with the issues before them but directed the federal courts to apply state law as *"declared . . . by its highest court in a decision." Erie, supra,* 304 U.S. at 78 (emphasis supplied). Dicta by the New Jersey Supreme Court is a declaration by the highest court in a decision, and should have been followed and applied below. When the highest court of the state "has spoken, its pronouncement is to be accepted by federal courts as defining state law unless it has later given clear and persuasive indication that its pronouncement will be modified, limited or restricted." *West v. American Telephone & Telegraph Co.*, 311 U.S. 223, 236 (1940) (citing *Wichita Royalty Co. v. City National Bank*, 306 U.S. 103, 107 (1939)).

Third, the effect of decisions of intermediate or even trial level courts in determining state law is implicated here. In addition to the common law claims for damages under the authority of *Interstate Telephone* and *Hercules Powder*, there was also a separate and distinct statutory claim for reimbursement of benefits paid under the New Jersey worker's compensation statute, N.J. Stat. Ann. § 34:15-40 (West 1988). The district court had granted summary judgment for failure to give the "explicitly required statutory notice" under New Jersey law (App.

37a), even though the record was uncontroverted that the party defendants had received actual notice of the intention to make claims for workers' compensation benefits paid.

The courts of New Jersey have not insisted upon precise statutory notice, however. A trial court has found notice to be sufficient under the statute, for instance, where served by certified mail rather than the statutorily specified registered mail. *See, e.g., Wager v. Burlington Elevators, Inc.*, 116 N.J. Super. 390, 394, 282 A.2d 437, 440 (Law Div. 1971). Although the New Jersey Supreme Court has not passed upon the precise question here, the New Jersey Court of Errors and Appeals (the predecessor to that court), has held actual notice to be sufficient under the statute. *Travelers Insurance Co. v. Gardner,* 129 N.J.L. 159, 161, 28 A.2d 507, 508-09 (Err. & App. 1942).

In assessing the precedential value of lower court decisions, the federal courts are required to keep in mind that "[a]n intermediate state court in declaring and applying the state law is acting as an organ of the State and its determination, in the absence of more convincing evidence of what the state law is, should be followed by a federal court in deciding a state question." *Fidelity Union Trust Co. v. Field,* 311 U.S. 169, 177-78 (1940). The district court here did not afford proper regard to New Jersey law on this issue, and the Third Circuit's failure to review this alternative ground for relief is in conflict with the decisions of the Court and should be set aside.

Although the Court has, from time to time, addressed factors to be considered in ascertaining state law, the Court's decisions have not spoken to the standards of

analysis to be utilized in the absence of an authoritative holding on the precise question in issue, nor has the Court made clear the restrictions on this analysis, such as how narrowly or broadly a closely analogous case may be read to achieve a particular result. Absent an articulation of such considerations, and the relative weight to be afforded each, the accuracy of prediction of state law and the ability to emulate state judicial decision-making is compromised. A coherent doctrine and a definitive standard are needed to assist the federal courts in what the Court christened the "relatively unguided *Erie* choice" in *Hanna v. Plumer*, 380 U.S. 460, 471 (1965), and to prevent erroneous predictions by the district courts in the first instance and by the reviewing courts under *Salve Regina College*.

In ascertaining unsettled state law, courts are most likely to utilize a predictive approach because " 'estimates' are necessarily often all that federal courts can make in ascertaining what the state court would rule to be its law." *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 209 (1950) (Frankfurter, J., concurring). While in theory, "the predictive approach most closely comports with the policies and concerns underlying the *Erie* doctrine," Note, *The Law/Fact Distinction & Unsettled State Law in the Federal Courts*, 64 Tex. L. Rev. 157, 165 (1985), in practice the goals underlying *Erie* and its progeny have been undermined because of the lack of a standard.

The Court should consider such a standard of analysis, particularly in the context of predictive analysis. A prediction is nothing more than an application of the doctrine of foreseeability, a basic element of tort law applied by the courts every day. To paraphrase Dean

Prosser, a foreseeable risk is a result which is apparent or should be apparent in light of all possibilities apparent at the time. *See* W. Prosser & W. Keeton, *The Law of Torts* § 31, at 170 (5th ed. 1984). So, too, does a prediction of state law factor in all possibilities apparent to the federal court, including dicta, the context in which the declaration of state law has been made, the decisions of the lower state courts, and the progressiveness or relative conservativeness of the highest court, keeping in mind both *stare decisis* and the reality that the law is not static but constantly evolving.

The Court should revisit *Erie* and provide, once and for all, guidance to the federal courts as to their responsibilities in difficult cases.

IV. IF THE COURT OF APPEALS COULD FIND NO BASIS IN STATE LAW UPON WHICH TO BASE A PREDICTION WITH ANY DEGREE OF CERTAINTY, IT SHOULD NOT HAVE DECLINED TO REMIT THE QUESTIONS TO STATE COURT.

If the Court or Appeals was uncertain about the continued viability or applicability of *Interstate Telephone* and *Hercules Powder,* it need not have deferred to the district court. The federal courts may certify to the highest court in the state the question whether a particular cause of action is recognized under state law, or, if state law does not provide for a certification procedure, the parties may be remitted to state court to resolve the questions of controlling state law. *Lehman Brothers v. Schein,* 416 U.S. 386, 390 (1974) (citing *Kaiser Steel Corp. v. W.S. Ranch Co.,* 391 U.S. 593 (1968)). State certification procedures and the device of remitting the parties to state

court "are a very desirable means by which a federal court may ascertain an undecided point of state law" and are "more likely to produce the correct determination of state law. . . . " *Lehman Brothers*, 416 U.S. at 394, 395 (1974) (Rehnquist, J., concurring).

The Court's decision in *Meredith v. Winter Haven*, 320 U.S. 228 (1943) teaches that mere difficulties in determining state law do not justify remittal to the state courts. When confronted with a particularly close question of state law, however, the Court has encouraged the federal courts to certify or remit the question to the state courts rather than simply fail to make the prediction at all.

This alternative is particularly compelling here. In enacting the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 *et seq.* (1986), the statute under which removal was effected, Congress did not confer exclusive jurisdiction in the federal courts. The parties' respective rights and liabilities could have been litigated in the state courts, and but for removal (in a case where diversity did not exist), petitioners would have at least had an opportunity for the New Jersey Supreme Court to decide these issues once and for all. Petitioners should not be deprived of a decision by the New Jersey courts as a consequence of removal to federal court.

Although New Jersey does not make the certification procedure available, remittal would result in a definite answer to the question the Third Circuit was unable to address. Petitioners respectfully request, as alternative relief, that the Court grant certiorari to consider and evaluate this alternative.

CONCLUSION

For the reasons set forth above, petitioners urge that this petition for writ of certiorari be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-5295

TRUMP TAJ MAHAL ASSOCIATES; TRUMP CASTLE ASSOCIATES; TRUMP PLAZA ASSOCIATES; HELICOPTER AIR SERVICES, INC.,
Appellants

v.

CONSTUZIONI AERONAUTICHE GIOVANNI AGUSTA S.P.A.; AGUSTA S.P.A.; GRUPPA AGUSTA; AGUSTA AVIATION CORPORATION a/k/a AGUSTA AEROSPACE CORPORATION; PARAMOUNT AVIATION CORPORATION,
Appellees

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 90-03245)

SUR PETITION FOR REHEARING

PRESENT: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, NYGAARD, ALITO and ROTH, *Circuit Judges*

The petition for rehearing filed by appellants in the above captioned matter having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the

circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ William D. Hutchinson
Circuit Judge

DATED: March 12, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-5295

TRUMP TAJ MAHAL ASSOCIATES; TRUMP CASTLE ASSOCIATES; TRUMP PLAZA ASSOCIATES; HELICOPTER AIR SERVICES, INC.,
Appellants

v.

CONSTUZIONI AERONAUTICHE GIOVANNI AGUSTA S.P.A.; AGUSTA S.P.A.; GRUPPA AGUSTA; AGUSTA AVIATION CORPORATION a/k/a AGUSTA AEROSPACE CORPORATION; PARAMOUNT AVIATION CORPORATION,
Appellees

Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 90-03245)

District Judge: Honorable John F. Gerry

Argued: January 30, 1992

PRESENT: SLOVITER, *Chief Judge*, MANSMANN and HUTCHINSON, *Circuit Judges*

JUDGMENT ORDER

On the merits, appellants seek recognition of a cause of action by an employer for recovery of economic damages it may suffer when a key employee dies as a result of

either a third party's tortious acts or breach of warranty under New Jersey law. At the threshold, we confront the question of whether the removal of this action by a corporate aircraft manufacturer, a majority of whose shares were indirectly owned by the Italian government, was proper pursuant to 28 U.S.C.A. § 1441(d) (West Supp. 1991) and the Foreign Sovereign Immunities Act (the Act), 28 U.S.C.A. § 1603 (West Supp. 1991). If so, we must also decide whether the district court had pendent jurisdiction over the other appellees in the absence of diversity jurisdiction pursuant to 28 U.S.C.A. § 1332 (West Supp. 1991) or any other independent basis for the court's jurisdiction. We conclude that the Italian government's indirect ownership of Agusta S.P.A. sanctions removal from state to federal court. In addition, the legislative history of section 1441(d) and its use of the words "[a]ny civil action . . . against a foreign state" in contrast to the words "civil actions on claims against the United States" as used in the Federal Tort Claims Act, 28 U.S.C.A. § 1346(b) (West 1976), demonstrates Congress's intent to allow pendent jurisdiction to the full extent the Constitution allows. Accordingly, we hold the district court had pendent jurisdiction over all the appellees once this action was removed by the foreign state pursuant to 28 U.S.C.A. § 1441(d) despite the absence of complete diversity. *See Teledyne, Inc. v. Kane Corp.*, 892 F.2d 1404, 1407-08 (9th Cir. 1989).

On the merits, appellants rely in substantial part on dicta in *Interstate Telephone & Telegraph Co.*, 90 A. 1062 (N.J. 1914), stating that an employer may recover damages against a third party for the loss of its employee's services, and *United States Casualty Co. v. Hercules Powder*

Co., 72 A.2d 190 (N.J. 1950), stating that an employer may bring a breach of warranty action which it has in its own right against a third party where such breach results in its employee's injury or death. These cases are, however, readily distinguishable, and the dicta relied on, though supportive of appellants' position, were not required for the results the Supreme Court of New Jersey reached. Considering these distinctions along with the language and purpose of the New Jersey wrongful death statute, N.J. Stat. Ann. §§ 2A:31-1 to -6 (West 1987), we are unable to predict with any degree of certainty that the Supreme Court of New Jersey would recognize an employer's cause of action for economic damages it suffers when a key employee dies as a result of the acts of a third party.

We will therefore affirm the judgment of the district court in all respects essentially for the reasons set out in its opinion. *See Trump Taj Mahal Assocs. v. Constuzioni Aeronautiche Giovanni Agusta, S.p.A.*, 761 F. Supp. 1143 (D.N.J. 1991).

Costs shall be taxed against appellants.

By the Court,

/s/ Wm. D. Hutchinson
Circuit Judge

ATTEST:

/s/ Sally Mrvos
Sally Mrvos, Clerk

DATED: FEB 12 1992

Costs taxed in favor of Appellee Constuzioni as follows:

Briefs.....$373.46

Costs taxed in favor of Appellee Paramount Aviation Corp. as follows:

Briefs.....$284.00

TOTAL.....$657.46

Certified as a true copy and issued
in lieu of a formal mandate on March 31, 1992.

Attest: /s/ Sally Mrvos

Clerk, U.S. Court of Appeals for the Third Circuit

FOR PUBLICATION

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

TRUMP FAJ MAHAL ASSOCIATES, A Limited Partnership, TRUMP CASTLE ASSOCIATES, TRUMP PLAZA ASSOCIATES, and HELICOPTER AIR SERVICES, INC.	:	Civil Action No. 90-3245(JFG)
Plaintiffs,	:	OPINION
v.	:	
COSTRUZIONI AERONAUTICHE GIOVANNI AGUSTA, S.p.A., AGUSTA S.p.A., GRUPPO AGUSTA, AGUSTA AVIATION CORPORATION, a/k/a Agusta Aerospace, and PARAMOUNT AVIATION, INC.	:	(Filed Apr. 11, 1991)
Defendants.		

APPEARANCES:

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Attorneys for Defendant, Paramount Aviation Corp.

GERRY, CHIEF JUDGE:

This case arises from the notorious helicopter crash on October 10, 1989 in Lacey Township, New Jersey, in which three top executives in Donald Trump's organization were killed. Plaintiffs are the three Trump owned Atlantic City casinos (collectively "Trump") and Helicopter Air Services, Inc., a Delaware corporation with its

principal place of business in Linden, New Jersey. Defendants are Costruzioni Aeronautiche Giovanni Agusta S.p.A. ("CAGA"), Agusta S.p.A., and Gruppo Agusta (collectively "Agusta"), the Italian corporate entities that manufactured the Agusta A109 helicopter that crashed in the above accident; their United States subsidiary, Agusta Aviation Corporation ("AAC"); and Paramount Aviation, Inc. ("Paramount"), which was "in the business of operating, maintaining and managing the helicopter." Complaint (Compl.) ¶9. (Paramount also employed the pilot of the helicopter, who also died in the crash.)

Plaintiffs filed in New Jersey state court. Defendants removed here. Before the court are plaintiffs' motion to remand and defendants' motion to dismiss. Paramount is named in three of the eight counts and joins in Agusta's motion to dismiss those counts.

The Trump plaintiffs seek recovery on two grounds. First, plaintiffs seek reimbursement of benefits they paid to decedents' beneficiaries under New Jersey's worker's compensation law. Second, plaintiffs invoke eight theories of liability to recover damages flowing from the death of their three "key" employees. Compl. ¶32-33. Although framed in eight counts, these damages theories are in essence different ways of articulating a wrongful death claim.

Helicopter Air Services seeks to recover $300,000 in damages based on the diminution in value of an Agusta A109 helicopter it owns, a cause of action arising solely as "a further result of the conduct of the Defendants and the public mistrust over the safety of continued operation of the Agusta 109 helicopters" since the October 10, 1989

crash. Compl. ¶38. Defendants argue that such a cause of action is "frivolous" and should be "summarily dismissed." We agree. Helicopter Air Services has not opposed the motion, which will be granted.

The motion to remand turns on two issues. First, defendant Agusta S.p.A. removed on the basis that it is an Italian corporation, owned by the Italian government, and so qualifies for removal as a "foreign state." Plaintiffs challenge Agusta's status as a "foreign state." Second, plaintiffs argue that the presence of a non-diverse New Jersey defendant, Paramount Aviation, makes removal improper. Defendants argue that removal is proper at the sole discretion of the "foreign state," despite the presence of a non-diverse defendant. We find that defendant Agusta S.p.A. was entitled to remove this action regardless of the presence of a nondiverse defendant, and will therefore deny the motion to remand.

The key question regarding plaintiffs' claim for reimbursement of worker's compensation benefits is whether defendants received statutory notice from plaintiffs. Because we find that plaintiffs did not provide the expressly provided statutory notice, we will grant summary judgment for defendants on this claim.

The threshold question raised by defendants on their motion to dismiss is whether a corporation can ever recover damages flowing from the death of its employees. Defendants argue that courts have unanimously held that a corporation may not recover for losses arising from the death (as opposed to injury) of its employees; and that no matter what theories of liability plaintiffs invoke, at bottom this is a wrongful death action, and corporations are

not a statutorily approved beneficiary of such damages. No matter how properly plaintiffs may have stated a claim for strict liability or negligence, for example, the basis of their claim is the damages they have suffered from the death of their three employees, and defendants assert that that is an impermissible basis for recovery by a corporation. We agree and will dismiss the complaint.[1]

Defendants also attack plaintiffs' theories of liability in Count VI, "wilful destruction and spoilation of evidence, and breach of agreement to preserve trial evidence and fraud"; and Count VIII, "willful, intentional interference with contractual employment relations." These counts name only the Agusta defendants. We find that New Jersey does not recognize the cause of action in Count VI, and plaintiffs fail to state a claim against these defendants under Count VIII. These counts would therefore be dismissed even if plaintiffs were entitled to seek damages arising from the death of their employees.

---

[1] The parties have submitted affidavits on both plaintiffs' motion to remand and defendants' motion to dismiss. Because the court finds the affidavits on the issue of statutory notice essential to deciding the motion to dismiss plaintiffs' claim for reimbursement of worker's compensation benefits, the court will convert the Rule 12(b)(6) motion into a Rule 56 summary judgment motion on that claim. The court will not convert the motion to dismiss plaintiffs' eight count damages claim. The court may consider affidavits regarding the motion to remand without changing the posture of the motion.

I. FACTS

The following facts are drawn from the complaint and are accepted as true for purposes of the motion to dismiss:

> 13. Sometime prior to 1984, the Defendants Agusta designed a seven place twin turbine helicopter known as the Agusta 109 ("109").
>
> 14. The 109 was designed with four metal rotor blades consisting of a front aluminum spar and aluminum honeycomb filler with an aluminum outer skin.
>
> 15. The military variant of the 109 was designated the Agusta "109K," and sold to international military establishments, except in the United States, and were equipped with the same main rotor blades . . . .
>
> 16. The main rotor blades were designed, built and sold with a represented service life of 3,000 hours between replacement.
>
> 17. Shortly before the introduction of the 109 and 109K, and long before either aircraft achieved 3,000 hours on the main rotor blades, the Agusta Defendants received reports of design and manufacturing defects that resulted in cracks developing in the main rotor blades.
>
> 18. The cracks, some of which were usually invisible to the unaided eye, were generally accompanied by vibrations of varying magnitude, which could not be adjusted out of the helicopter through normal maintenance techniques.

19. At all times, the Agusta Defendants held themselves out as experts in the design, construction and maintenance of helicopters and the ultimate authority on the 109 and 109K, upon which expertise the Plaintiffs, the United States Government, and the Italian equivalent of the Federal Aviation Administration relied.

20. Long prior to 1989, the Defendant Paramount acquired the rights to operate the [109] helicopter in charter service under the Paramount certificate of authority.

21. Paramount then arranged and performed management and maintenance of the [109] helicopter, operation of the helicopter under Part 135 of the Federal Aviation Regulations in helicopter taxi service, and was responsible for the scheduling, inspections, maintenance and overhaul of the helicopter and its components.

22. From the very first day the helicopter was delivered to a retail customer and regularly prior to October 10, 1989, the helicopter suffered vibrations identified as emanating from the main rotor blades, especially during translational lift – that period when the flight of the helicopter changes from forward flight to hover and vice versa.

23. Consultations and maintenance performed by and with the Agusta Defendants, by predecessor lessees, Paramount and the Plaintiffs about this vibration resulted in no improvement in the vibration, but rather assurances were given in Philadelphia, Pennsylvania, Morristown, New Jersey and elsewhere, that the vibration was within normal limits and the [109] helicopter was safe for normal operation.

24. Notwithstanding the assurances given by the Agusta Defendants to Paramount, the Plaintiffs, and predecessor lessees, Agusta and Paramount knew that other Agusta 109 and military and 109K helicopters with similar vibrations had suffered catastrophic or near catastrophic rotor blade failures.

25. Notwithstanding the assurance afforded, the Agusta Defendants and Paramount knew that the very sister ship to the [109] helicopter [that crashed and killed plaintiffs' employees] had suffered a crack in a main rotor blade after similar reports of vibration only one year before October 10, 1989.

26. Notwithstanding the[se] assurances . . . , the Agusta Defendants and Paramount knew that the inevitable result of the vibration would be rotor blade failure and the certain loss of life and serious personal injury resulting therefrom.

27. In August 1989 and again in September of 1989, the helicopter [that crashed] was brought to the Agusta Defendants for further examination of the rotor system vibration, and again the Agusta Defendants assured Paramount and the flight crew that the vibration was within normal limits.

28. Aboard the helicopter [at the time of the crash] were three passengers, Stephen Hyde, Mark Etess and Jonathan Benanav, all of whom were killed.

29. At the time of his death, Stephen Hyde was employed by Plaintiffs Taj Mahal, Castle and Plaza as Chief Executive Officer, and in that capacity had overall responsibility for the entire Atlantic City casino operations of the Plaintiffs.

30. At the time of his death, Mark Etess was employed by the Taj Mahal as its Chief Operating Officer, and in that capacity had overall responsibility for the completion and opening of that casino, together with its day to day operations, including the planning and development of mega events, casino business development, operations and accounting and implementation of controls.

31. At the time of his death, Jonathan Benanav was employed by the Trump Plaza as Vice President in charge of non-casino operations and was responsible for all food and beverage services in that casino and was to assume the role as head of all non-casino operations of the Plaintiffs' Atlantic City casino operations.

32. All of the decedents were employed in capacities critical to the successful operation of the Plaintiffs, were key employees upon whose services the Plaintiffs relied and depended for the successful continuation of their business enterprises.

33. All of the decedents were crucial management personnel without whose services the Plaintiffs have and will suffer financial damages including, but not limited to:

a. Loss of the value of their services;

b. Loss of revenue;

c. Increased expenses and cost of operation;

d. Higher costs for replacement personnel;

e. Financial losses far exceeding the cost to the Plaintiffs for the services of the deceased;

f. Damages to the casino operations as a result of managerial inefficiency;

g. Loss of mega events and the resultant loss of income;

h. Other damages as yet unfolding, both as to category and amount.

34. The Plaintiffs were under contract to the deceased Hyde and Etess to pay half of their salaries for a period of two years following their death, and as a result of the death of Hyde and Etess, the Plaintiffs have [paid] and will pay substantial sums of money pursuant to the[se] contracts.

Id., ¶¶13-34.

II. MOTION TO REMAND

Because the motion to remand addresses the subject matter jurisdiction of the court, we turn to it first. Defendant Agusta S.p.A. removed this action from New Jersey state court on August 10, 1990.

a) Removal Was Proper

Plaintiffs argue that removal was improper because defendant Agusta S.p.A. ("Agusta") does not qualify as a "foreign state" under the removal provision in 28 U.S.C. § 1603(a). This is so for two reasons. First, Agusta is not a "foreign state" because neither the notice of removal nor the affidavit submitted by Emilio Fraipont, counsel for Agusta, establishes that Agusta is owned by the Italian

government. Second, Agusta is not a "foreign state" because of the link between the three Italian corporate defendants and their wholly-owned United States subsidiary, defendant Agusta Aviation Corporation ("AAC"). AAC is a Delaware corporation with its principal place of business in Philadelphia, Pennsylvania, and a wholly-owned subsidiary of the Agusta defendants. Compl. ¶8. Defendants argue that ownership of a United States subsidiary does not make Agusta a citizen of the United States.

Plaintiffs further argue that removal was improper because the court does not have authority to exercise pendent party jurisdiction over defendant Paramount Aviation. Thus, the case should be remanded in its entirety.

The removal statute provides, in relevant part:

> Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury.

28 U.S.C. § 1441(d).

1. Agusta Is a "Foreign State" Under Section 1603(a)

Defendant Agusta, S.p.A. filed a notice of removal on August 10, 1990. The notice alleged:

> 2. The underlying action is an action brought against a "foreign state" as defined in 28 U.S.C.

> § 1603(a). Defendant Agusta, S.p.A. was at the time that this action was commenced, and still is, an "agency" or "instrumentality" of the Government of Italy within the meaning of the Foreign Sovereign Immunities Act [("FSIA"), 28 U.S.C. § 1602 *et seq.*] and therefore defendant . . . is considered a "foreign state" as defined by 28 U.S.C. § 1603(a) . . . .
>
> 3. Defendant, Agusta S.p.A. is neither a citizen of a state of the United States as defined by 28 U.S.C. §§ 1332(c) and (d) nor has it been created under the laws of any third country.

Id. ¶¶2-3. On its face the notice sets forth an adequate basis for removal.

An "agency or instrumentality" of a foreign state is an entity:

> (1) which is a separate legal person, corporate or otherwise; and
>
> (2) which is an organ of a foreign state or a political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof; and
>
> (3) which is neither a citizen of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603(b). The first requirement is not in dispute. Plaintiffs argue first that neither the notice of removal nor the Fraipont affidavit establishes that the Italian government owns Agusta S.p.A. Further, while the notice does declare that Agusta S.p.A. is not a citizen of the United States, Agusta should be considered a United

States citizen because of defendant AAC, a wholly-owned United States subsidiary of Agusta. Thus, plaintiffs assert, Agusta fails (2) and (3) above and does not qualify as an "agency or instrumentality" of a foreign state.

A. The Italian Government Owns Agusta

Agusta states that the Italian Government owns and controls Agusta S.p.A. through the state agency, Ente Partecipazioni e Finanziamento Industria Manifatturiera ("EFIM"). *See* Affidavit of Rudolph V. Pino, counsel for the Agusta defendants, at ¶7; Affidavit of Emilio Fraipont, general counsel for Agusta, at ¶¶6-11. The Fraipont affidavit sets forth the relationship between Agusta S.p.A. and the Italian government:

> 5. Defendant Agusta S.p.A. functions primarily as a holding company and prior to November 1988 [when it merged with CAGA] was not directly engaged in the business of the design, manufacture, maintenance and or sale of aviation products.
>
> 6. Agusta S.p.A. is owned and controlled by the Italian Government through Ente Partecipazioni e Finanziamento Industria Manifatturiera ("EFIM")[,] the state owned agency created to own, supervise and manage companies that are important to the national interest.

Id. ¶¶5-6. EFIM owns and controls MCS S.p.A., which is EFIM's "financial operating company." *Id.* ¶11. MCS S.p.A. in turn owns Aviofer Breda S.p.A., "an entity which holds the shares of the companies in the aviation sector" under EFIM. *Id.* Aviofer Breda owns 98.9% of the

shares of Agusta S.p.A. *Id.* Thus, the Italian government owns and controls at least 98.9% of the shares of defendant Agusta S.p.A.[2]

However, plaintiffs argue that the link between Agusta and the Italian government is too remote, that Agusta has not established that the Italian government has "a majority ownership in the defendant itself." Plaintiffs' Reply Brief (PRB) at 4. This is so because "none of the defendants in this case are public Italian corporations, but rather are all private Italian business corporations . . . which may at some point many times removed be owned by agencies of the Italian government." *Id.* at 3, 6. Plaintiffs concede that "[t]he Italian government,

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[2] Plaintiffs submit the affidavit of Andrea Castellucci, an Italian corporate lawyer, prepared in response to a previous affidavit given by Emilio Fraipont in a related case arising from the same accident, *Kent v. Agusta Aerospace Corporation*, Civil Action No. 90-2233 (E.D. Pa.). However, this affidavit is not based on personal knowledge, nor was it prepared in response to the affidavit of Mr. Fraipont submitted in *this* action. It is Castellucci's "opinion that under Italian law, the three [defendant] companies are not owned, operated, controlled nor are they instrumentalities of the Italian Government, but rather are private corporations." The affidavit focuses on facts gleaned from "official sources" (much in the manner of news reporting) that defendants are private companies, created by private contract, were not established by the Italian government, are not regulated by the government, and have no public power or function. We note, crucially, that the Castellucci affidavit neglects to examine the relationship between the Italian government and EFIM, the government agency which is the vital link between defendants and the Italian government. We therefore reject Castellucci's "opinion" surmised from "official sources" in favor of Mr. Fraipont's analysis, based on his sworn personal knowledge.

through EFIM, clearly has some degree of involvement with Agusta," but argue that the "nexus" is insufficient. *Id.* at 4. It would be one thing if the Italian government owned Agusta directly, they argue, but it is another (and too remote) to have EFIM wholly own MCS, MCS wholly own Aviofer Breda, and finally Aviofer Breda own 98.9% of Agusta. This, plaintiffs argue, is not the type of ownership contemplated by section 1603(b)(2). *Id.*

Section 1603(b)(2) specifies that an "agency or instrumentality" of a foreign state is any entity "a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." It is irrelevant whether Agusta is a public corporation or a private corporation, so long as the Italian government has a majority ownership interest in Agusta. It does so, through EFIM, as set forth in the Fraipont affidavit.

The Second Circuit considered a similar case in *O'Connell Machinery Co. v. M.V. "Americana"*, 734 F.2d 115, 116 (2d Cir.), *cert. denied*, 469 U.S. 1086 (1984):

> According to the affidavit of Gerardo Carante, Chief Officer of the Commercial Office at the Embassy of the Republic of Italy in Washington, a majority of the shares of the Italian Line is owned by the Societa' Finanziaria Marittima (FINMARE). FINMARE, in turn, is under the direct control of the Istituto per la Ricostruzione Idustriale [IRI], a public financial entity which coordinates the management of the commercial enterprises of the Italian Government. Based on these facts . . . the district court correctly concluded that the Italian Line qualifies as an agency or instrumentality of the Republic of Italy.

> The fact that the Italian Government saw fit to double-tier its administrative agencies did not compel a holding to the contrary. According to the legislative history of the FSIA, political subdivisions were intended to include "all governmental units beneath the central government." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 15, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6604, 6613. FINMARE fits comfortably within this definition.

Id., 734 F.2d at 116-117 (citations omitted). If we put Agusta in a position analogous to the Italian Line, then EFIM is analogous to IRI. EFIM is "the state owned agency created to own, supervise and manage companies that are important to the national interest." Fraipont Affidavit ¶6. IRI is "a public financial entity which coordinates the management of the commercial enterprises of the Italian government." 734 F.2d at 116. The Second Circuit held that the "double-tier" of FINMARE and IRI (both administrative agencies) did not disturb the Italian Line's "foreign state" link. The link between Agusta and EFIM is triple-tiered (Agusta to Aviofer Breda, to MCS, to EFIM), an insufficient basis on which to distinguish this case from *O'Connell* in this regard.

Plaintiffs further argue that Agusta is not the "type of entity" contemplated by the statute, and refers the court to the FSIA legislative history:

> As a general matter, entities which meet the definition of an "agency or instrumentality of a foreign state" could assume a variety of forms, including a state trading corporation, a mining enterprise, a transport organization such as a

> shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name.

H.R. Rep. No. 1487, 94th Cong., 2d Sess. 15, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6604, 6614. As plaintiffs note, the list above was "[b]y way of illustration." PRB at 5. However, plaintiffs would have the court read this as an exclusive rather than an illustrative list. We reject that conclusion.

We thus conclude that Agusta satisfies section 1603(b)(2).

B. Agusta Is a Citizen of Italy

The complaint recognizes that CAGA is "a corporation organized and existing under the laws of the Nation of Italy, and not a citizen of the United States." Compl. ¶5. Further, Agusta S.p.A. is "a corporation organized and existing under the laws of the Nation of Italy, and not a citizen of the United States." *Id.* ¶6. Gruppo Agusta is "an acronym selected by the Agusta Defendants to describe the totality of the Agusta aviation operations to include helicopter, military, and civilian aircraft activities . . . . This entity is organized under the laws of the Nation of Italy, and *does not have its principal place of business in the United States* . . . although it is represented in the United States through the wholly-owned subsidiary and affiliate known as Agusta Aviation Corporation." Compl. ¶7 (emphasis added). These three defendants (collectively "Agusta") are in essence one entity, and will be

treated as such for purposes of this motion.[3] Moreover, defendant AAC is alleged to be a subsidiary of each of them.

A corporation is deemed to be a citizen of any state by which it has been incorporated and of the state where it has its principal place of business. 28 U.S.C. § 1332(c). The statute does not provide that a foreign corporation becomes a United States citizen by fact of its ownership of a United States subsidiary. *See Bailey v. Grand Trunk Lines*, 609 F. Supp. 48 (D. Vt. 1984), *aff'd in part*, 805 F.2d 1097 (2d Cir. 1986), *cert. denied*, 484 U.S. 826 (1987) (foreign corporation not citizen of United States despite ownership of United States subsidiary). A corporation can only have one principal place of business. *Bailey*, 805 F.2d at 1100; *United States Fidelity & Guaranty Co. (U.S.F.& G.) v. Di Massa*, 561 F. Supp. 348 (E.D. Pa. 1983), *aff'd*, 734 F.2d 3 (3d Cir. 1984). Agusta S.p.A.'s principal place of business is in Milan, Italy. Fraipont Aff. at ¶3. We conclude, then, that Agusta's relationship to AAC does not destroy its status as a "foreign state" for removal purposes.

Plaintiffs urge that the court should give greater weight to the United States citizenship of the subsidiary AAC, because of what plaintiffs see as a remote link between Agusta and the Italian government: "In short, if ownership so remote by EFIM is critical to [Agusta's] status as a foreign state, shouldn't [the citizenship of] a subsidiary which without dispute is the sole operating

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[3] Defendants state that "[o]n November 30, 1988, Costruzioni Aeronautiche Giovanni Agusta S.p.A. ("CAGA") was merged into Agusta S.p.A. and, under Italian law, [Agusta S.p.A.] is the successor of CAGA." Fraipont Affidavit at ¶4.

entity in the United States and clearly outside the Act under subsection (b)(3)[,] be of at least equal . . . weight in determining for purposes of its conduct in this case its country of citizenship?" PRB at 2. This argument sidesteps the insurmountable hurdle that a corporation may have only one principal place of business. For Agusta that place is Milan, Italy, and ownership of a United States subsidiary does not disturb that fact.

2. The Court May Properly Exercise Pendent Party Jurisdiction Over Defendant Paramount Aviation

Plaintiffs' second basis for remand is that since the court has no alternative basis of jurisdiction over defendant Paramount, it must remand the entire action. First, there is no diversity jurisdiction since the Trump plaintiffs are New Jersey entities and Paramount is a New Jersey corporation. Second, there is no federal question jurisdiction. The parties agree on these two points. Third, the court cannot properly exercise pendent party jurisdiction over Paramount. Defendants disagree. So do we.

Section 1441(d) provides for the removal of any action by a foreign states as follows, in relevant part: "*Any* civil action brought in a State court against a foreign state . . . may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441(d) (emphasis added).

The jurisdiction of the federal courts over claims involving foreign states is conferred pursuant to section 1330(a), which provides in relevant part: "The district

courts shall have original jurisdiction without regard to amount in controversy of *any* nonjury civil action against a foreign state as defined in section 1603(a)." 28 U.S.C. § 1330(a) (emphasis added). (All removed actions are to be nonjury under section 1441(d).)

The legislative history establishes that Congress anticipated cases such as this case, where a foreign state is joined with non-foreign defendants:

> In view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area, it is important to give foreign states clear authority to remove to a Federal forum actions brought against them in the State courts. New subsection (d) of section 1441 permits the removal of any such action at the discretion of the foreign state, even if there are multiple defendants and some of these defendants desire not to remove the action *or are citizens of the state in which the action has been brought.*

H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 13, *reprinted in* 1976 U.S. Code Cong. & Ad. News at 6631 (emphasis added).

Plaintiffs note that the FSIA does not grant *exclusive* jurisdiction in the federal courts, but also permits state court actions. Plaintiffs Brief ("PB") at 18. From that fact plaintiffs argue that the statute does not "expressly provide for removal of an entire action pending in state court against all defendants, regardless [of] whether an independent basis of jurisdiction exists over defendants other than the foreign sovereign." *Id.* at 18-19. However, the above legislative history is to the contrary. Plaintiffs

describe this passage from the legislative history as ambiguous, since "there may be an independent basis of federal jurisdiction over defendants which are citizens of the state where the action has been brought." PB 19, n. 1. However, the underlined passage would be superfluous if federal question jurisdiction existed, since those parties would clearly be removed with the foreign state. The passage is only significant to the extent it provides an exception to the diversity requirement, and underscores the extent of the "discretion" granted the foreign state.

Plaintiffs argue that the recent Supreme Court decision in *Finley v. United States*, 490 U.S. 545 (1989), dictates that the lack of subject matter jurisdiction over defendant Paramount requires the court to remand the entire case. The *Finley* Court reasoned:

> The [Federal Tort Claims Act] FTCA, § 1346(b) confers jurisdiction over "civil actions on claims against the United States." It does not say "civil actions on claims that include requested relief against the United States," nor "civil actions in which there is a claim against the United States" – formulations one might expect if the presence of a claim against the United States constituted merely a minimum jurisdictional requirement, rather than a definition of the permissible scope of FTCA actions. Just as the statutory provision "between . . . citizens of different States" has been held to mean citizens of different states and no one else, so also here we conclude that "against the United States" means against the United States and no one else. "Due regard for the rightful independence of state governments . . . requires that [federal courts] scrupulously confine their own jurisdiction to the

> precise limits which the statute has defined." The statute here defines jurisdiction in a manner that does not reach defendants other than the United States.

490 U.S. at 552-53 (citations omitted). Plaintiffs argue that this passage from *Finley*, although in a different context, still controls this case, and bars the exercise of pendent party jurisdiction where the case involves a defendant that is not a foreign state and there is no alternative basis for the court to exercise its jurisdiction over that defendant. Plaintiffs concede that neither *Finley* nor any of the cases upon which they rely address the issue of jurisdiction over pendent parties under the removal statute, nor involve the FSIA. PB at 16. Plaintiffs argue that "*Finley* clearly requires a close examination of the language of the jurisdictional statute invoked and congressional intent." PRB at 8. *See Finley*, 490 U.S. at 552-56; *Roco Carriers. Ltd. v. M/V Nurnberg Express*, 899 F.2d 1292, 1296 (2d Cir. 1990). Defendants argue that *Finley* is inapposite because of "the distinction in the relevant statutory grants of jurisdiction." Agusta Defendants' Brief ("DB") at 15.

As defendants note, the jurisdictional provision of the FSIA is quite broad, conferring jurisdiction over "[a]ny civil action brought in a state court against a foreign state as defined in section 1603(a)." 28 U.S.C. 1330(a). In *Teledyne, Inc. v. Kone Corp.*, 892 F.2d 1404 (9th Cir. 1989) (decided after *Finley* and construing the FSIA), the court found that the FSIA permits pendent party jurisdiction because no language in the statute limits jurisdiction to a certain category of parties:

> unlike the [Federal Tort Claims Act] FTCA, the FSIA extends federal jurisdiction over "any civil action" against a foreign state – a phrase which tends to affirmatively exclude the sort of unspoken qualification read into the statute in *Finley*.

Teledyne, 892 F.2d at 1409 (emphasis original). Moreover,

> If Congress wanted nothing more than to assure foreign states the right to a federal forum, it could have provided for *separation* of the claims against the foreign state from claims against other parties. Instead, Congress opted to give foreign states the right to a federal forum, *and* the right to take non-consenting co-defendants along with them. At the very least, subsection 1441(d) expresses an intention to give sovereign foreign defendants an absolute right to a federal forum coupled with an unusually strong preference for the consolidation of claims. We conclude that those preferences are expressed strongly enough to overcome any presumption against pendent party jurisdiction.

Id. (emphasis original). Although diversity provided an independent basis for federal jurisdiction over the pendent party in *Teledyne*, that fact does not undermine the force of the *Teledyne* court's reasoning, nor its reading of the legislative history of the FSIA: "the federal district courts have jurisdiction over 'any civil action against a foreign state'." *Id.* at 1410. *Accord Nolan v. Boeing Co.*, 919 F.2d 1058, 1064-66 (5th Cir. 1990).

We agree and find that removal was proper.

III. MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT

Both the Agusta defendants and Paramount move to dismiss for failure to state a claim, pursuant to Rule 12(b)(6). In reviewing a motion to dismiss for failure to state a claim upon which relief may be granted, "we must take all allegations and reasonable inferences which can be drawn [from the complaint] as true and view them in the light most favorable to the plaintiff[s]." *District Council 47, American Federation v. Bradley,* 795 F.2d 310, 313 (3d Cir. 1986). We may dismiss the complaint only if "it appears beyond doubt that the plaintiff[s] can prove no set of facts in support of [their] claim which would entitle them to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957) (footnote omitted).

Summary judgment as to the claim for reimbursement of worker's compensation benefits is appropriate only if there is no genuine issue of material fact and defendants are entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). An issue is "genuine" only if a reasonable jury, considering the evidence presented, could find for the non-moving party. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249 (1986). "Where the record as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial'." *Matsushita Elec. Indus. Co. v. Zenith Radio,* 475 U.S. 574, 587 (1986) (citations omitted).

The eight-count complaint sets forth two bases for relief, linked to eight theories of liability against defendants Agusta and, in three counts, also against Paramount. These include: strict liability in tort; fraud (also

against Paramount); gross negligence, willful misconduct, wantonness, and outrageous conduct (Paramount, too); negligence (Paramount, too); breach of express and implied warranties; willful destruction and spoilation of evidence, and breach of agreement to preserve trial evidence and fraud; fraud and deceit; and willful, intentional interference with contractual employment relations.

Plaintiffs first seek reimbursement of worker's compensation benefits paid to the statutory beneficiaries of the three Trump executives killed in the helicopter crash: "Under the New Jersey worker's compensation law specifically, the Plaintiffs are entitled to recover from the Defendants the sums paid or hereafter to be paid under that Act to or in behalf of the decedents' statutory beneficiaries." Compl. ¶36.

The second basis for recovery is broader, encompassing reimbursement not only of worker's compensation benefits, but also of contractual death benefits, as well as damages arising from the death of the Trump executives: "Under the authority of *Interstate Telephone and Telegraph Co. v. Public Service Electric Co.*, 86 N.J.L. 26, 90 A. 1062 (1914), the Plaintiffs are entitled to recover all sums paid to and in behalf of the decedents' estates by contract, all losses suffered by the Plaintiffs as a result of the conduct of the Defendants due to the loss of the value of the services of the deceased and all sums paid under the worker's compensation statute." *Id.* ¶37.

a) Plaintiffs Failed To Provide Statutory Notice And So Are Barred From Seeking Reimbursement of Worker's Compensation Benefits Paid To Decedents' Dependents

Plaintiffs seek reimbursement of monies paid under the New Jersey worker's compensation statute to the statutory beneficiaries of decedents Hyde, Etess and Benanav. The complaint alleges:

> 35. Under the worker's compensation law of the State of New Jersey, the Plaintiffs are obligated to pay the estates of the deceased Hyde, Etess and Benanov, various sums for funeral expenses, benefits to certain statutory beneficiaries, all of which payments are solely and proximately the result of the conduct of the Defendants.
>
> 36. Under the New Jersey worker's compensation law specifically, the Plaintiffs are entitled to recover from the Defendants the sums paid or hereafter to be paid under that Act to or in behalf of the decedents' statutory beneficiaries.

Compl. ¶¶35-36.

Defendants argue that "[b]ecause plaintiffs have not complied with the exclusive statutory prerequisites, they are not entitled to maintain an action for reimbursement." DB at 19. Specifically, plaintiffs have failed to perfect a statutory lien for third-party recovery under section 15-40 of the New Jersey Workmen's Compensation Act ("the Act"), N.J.S.A. 34:15-40(d) and (g), and are therefore barred from seeking reimbursement from defendants.

The Act provides, in relevant part:

> If at any time prior to the payment by the third person or his insurance carrier to the injured employee or his dependents, the employer or his insurance carrier shall serve notice, as hereinafter provided, upon such third person or his insurance carrier that compensation has been applied for by the injured employee or his dependents[,] it shall thereupon become the duty of such third person or his insurance carrier, before making any payment to the injured employee or his dependents, to inquire from such employer or his insurance carrier the amount of medical expenses incurred and compensation theretofore paid to the injured employee or to his dependents. . . . *Service of notice . . . shall be by registered mail, return receipt.*

N.J.S.A. 34:15-40(d) (emphasis added). "[S]ubparagraph (d) allows the employer or his carrier to recover monies paid by him to his employee for injuries caused by the wrongful act of a third person, while at the same time [it] protects the third person from paying double damages by requiring the employer or his compensation carrier to serve notice of the compensation lien on the tortfeasor before he pays the employee." *Wager v. Burlington Elevators, Inc.*, 116 N.J. Super. 390, 397, 282 A.2d 437 (1971). "The intent of the act is to apprise the third person, wrongdoer, that the employer makes claim under the law for a deductible amount from a judgment against such third person." *Erie R. Co. v. Michelson*, 111 N.J. Eq. 541, 162 A. 764, 766 (1932).

Subparagraph (g) of the same section provides:

> If such employee or his dependents effect a settlement with the third person or his insurance carrier or institute proceedings against the third person prior to the service of notice upon the third person or his insurance carrier . . . or prior to the institution of any proceedings against the third person by the employer . . . , *such employer* or his insurance carrier *is barred from instituting any action or proceedings against the third person* for the injuries and loss sustained by such employee or his dependents.

Id. (emphasis added). As defendants argue, subparagraph (g) prevents the employer from bringing a subrogation type action against a third party once the employee or his dependents have settled or instituted proceedings against the third party. DB at 21; *Wager,* 116 N.J. Super. at 397.

Thus, the plaintiffs are barred from seeking reimbursement by defendants unless they served the written notice of lien upon defendants before defendants settled with decedents' beneficiaries. *See Danesi v. American Mfrs. Mut. Ins. Co.,* 189 N.J. Super. 160, 166, 459 A.2d 686, *certif. den.,* 94 N.J. 544, 468 A.2d 194 (1983) ("failure to perfect the lien pursuant to subsection (d) means that neither the third-party tortfeasor nor his insurance carrier can be compelled to pay over any of the third-party recovery proceeds" to employer).

Plaintiffs respond that the issue of notice cannot be resolved on a motion to dismiss. Rather, it "is a proper area of inquiry for discovery" and defendants' argument "is in reality a defense which must be raised at trial, and

which should not, and cannot, be resolved on the pleadings." PB at 27. It is sufficient to state a claim, plaintiffs allege, for the complaint to state that plaintiffs are entitled to reimbursement pursuant to the Act. Implicit in such an allegation, however, is that plaintiffs have complied with all relevant provisions of the Act. Although the complaint states conclusorily that plaintiffs are entitled to reimbursement pursuant to the Act, it does not set out the facts to indicate compliance with that law. Defendants challenge the conclusory allegation by submitting an affidavit that demonstrates that plaintiffs failed to perfect their lien, and so may not recover against defendants. Plaintiffs would have the court disregard the Pino affidavit and permit plaintiffs to pursue discovery to develop their claim. However, any evidence that exists that plaintiffs served the proper statutory notice would be within plaintiffs' control, and discovery would reveal nothing further than what plaintiffs must already know on the issue of notice.

Defendants assert that plaintiffs have not served notice of their lien. Defendants have submitted an affidavit in support of their contention that notice has not been served, and that "[s]ettlement agreements with the Agusta defendants were entered into by the dependents of decedents Etess and Hyde on April 18, 1990[,] and with the dependents of decedent Benanav on April 29, 1990." *See* Affidavit of Rudolph V. Pino, Jr. at ¶¶8-10 and Exhs. B-D. Payment has been made by the Agusta defendants on these settlements. *Id.* Plaintiffs have not served the statutory notice. *Id.* at ¶11; Affidavit of Vincent Genovese, vice president finance and administration, Agusta Aerospace Corporation, ¶3 (AAC "has not

received any notification of a lien held by the plaintiffs for workmen's compensation payments").

Plaintiffs argue that "defendants clearly had actual notice prior to settlement that worker's compensation benefits had been applied for." PB at 27. However, plaintiffs do not argue that they complied with the statutorily required written notice mailed by "registered mail, return receipt." The statute does not provide merely that notice be given, but also describes explicitly the proper form of notice. Thus, the type of actual notice upon which plaintiffs rely, namely that defendants were "served with" a copy of a memorandum setting forth "our intentions to assert a claim for worker's compensation benefits on behalf of The Trump Organization" during the pendency of injunctive hearings before Judge Lord of the Eastern District of Pennsylvania in October 1989, clearly is not the notice required by the statute. *See* Supplemental Affidavit of Richard E. Genter, plaintiffs' counsel, ¶¶2-9; Plaintiffs' Supplemental Brief ("PSB") at 9.

Plaintiffs argue that "New Jersey courts have not insisted on literal compliance with the notice provision where, as here, written notice was actually received." PSB at 9. Plaintiffs rely on *Travelers Insurance Co. v. Gardner*, 129 N.J.L. 159, 28 A.2d 507 (1942), in which the proper statutory notice was sent and received by an employee of the defendant trustee, and the court deemed that receipt by the employee was the equivalent of receipt by the defendant. *Id.* at 161, 28 A.2d at 508-09. However, *Travelers* is inapposite because there *someone* representing the defendant received the statutorily required notice; here, no such notice was sent, much less received by an employee of any of the defendants. The other case relied

on by plaintiffs is also inapposite. In *Wager v. Burlington Elevators, Inc.*, 116 N.J. Super. 390, 282 A.2d 437 (Law Div. 1971), notice was served by certified rather than registered mail and deemed sufficient. Here, neither certified nor registered mail was used. These two cases do not support plaintiffs' efforts to bypass the statute's clear requirement that "[s]ervice of notice . . . shall be by registered mail, return receipt."

If we consider the affidavits submitted on the reimbursement claim, we must convert the 12(b)(6) motion to a motion for summary judgment pursuant to Rule 56. The court finds this to be the appropriate course. Accordingly, having found that plaintiffs failed to provide the explicitly required statutory notice and are therefore barred from seeking reimbursement of worker's compensation benefits, we will grant summary judgment for defendants on plaintiffs' claim for such reimbursement.

b) Damages Arising from Death of Trump Executives

Plaintiffs allege a common law right to recover for economic damages flowing from the death of their employees. Defendants argue that no such common law right exists and that this case is controlled by the New Jersey wrongful death statute, which also does not permit plaintiffs to recover damages arising from the death of their employees.

1. New Jersey Common Law Does Not Grant Plaintiffs a Right of Recovery

The parties agree that New Jersey state law governs this case. Plaintiffs' eight theories of liability for damages flow from two premises that they argue are supported by decisions of the New Jersey Supreme Court. First, plaintiffs assert that a corporation may recover for losses arising from the death of its employees. Plaintiffs rely on *Interstate Telephone* as having recognized this right initially, and on *United States Casualty Co. v. Hercules Powder Co.*, 4 N.J. 157, 72 A.2d 190 (1950), as later having "embraced an employer's common law right of action to recover for the death of its employees." DSB at 3. Defendants argue that neither *Interstate Telephone* nor *Hercules Powder* grants plaintiffs' such a right, and that plaintiffs are barred from bringing what is in essence a wrongful death action. Therefore, defendants argue, the entire complaint should be dismissed.

Second, plaintiffs assert that they are entitled to recover what are purely economic damages, albeit damages that are the direct result of the death of the Trump employees. Plaintiffs rely on *People Express Airlines, Inc. v. Consolidated Rail*, 100 N.J. 246, 495 A.2d 107 (1985) for the proposition that they are entitled to recover the economic damages to their businesses that resulted from the death of their employees. Defendants argue that *People Express* is inapposite because that case did not involve personal injury to any of the plaintiff's employees. We agree, for the reasons set forth below.

A. *Interstate Telephone* and *Hercules Powder* Do Not Support Plaintiffs' Cause of Action

Plaintiffs cite *Interstate Telephone & Telegraph Co. v. Public Service Electric Co.*, 86 N.J.L. 26, 90 A. 1062 (1914), as having "recognized the right of an employer to recover for loss of services of his employee due to the tortious act of a third party." PB at 13; PSB at 2. Plaintiffs do not quote the particular language in *Interstate Telephone* which supports that conclusion, but the likely language is that "the right of an employer to recover for loss of services of his employe[e] is weli settled, and is not questioned by the present defendant." 90 A. at 1062. (Since the defendant in *Interstate Telephone* did not question that right, the issue was not before the court. Defendants thus accurately describe the above passage as *dicta*.) The "case involve[d] the novel question whether the employer [wa]s entitled also to recover a sum which he ha[d] contracted to pay his employe[e]." *Id.* The court held that where an employee was injured by the tortious act of a third party, and the employer and employee had agreed that the employer would pay the employee a portion of his wages while he was on the mend but not working, the employer could not then recover the amount of those benefits from the third party. The court reasoned that "the right to the statutory compensation is a part of the compensation of the employe[e] for services rendered, for which the employer receives a quid pro quo. . . . It is one of the necessary expenses of the business against which the employer must protect himself by a higher price for his product or lower regular wages for his employe[e]s." *Id.* at 1063.

The court distinguished these "wages" from the "damages" to which employers had long been entitled under common law:

> The legal right of an employer to recover damages for the loss of services of employe[e]s due to a tortious act of a third person . . . never included the wages paid his servants for past work or the wages he might pay for future work. What the employer loses is the value of the services to him; what the present plaintiff seeks to recover is the value of the services to the employe[e]. The employer loses what he might have made over and above the cost of the employe[e]'s services; he does not in any proper sense lose the necessary expense of securing that labor.

Id. The court noted that plaintiff had been injured in 1912, while the New Jersey worker's compensation statute was not amended until 1913 to allow such reimbursement of the employer. Thus, in 1914 the court was construing the common law as it had existed before the enactment of the 1913 act (although the court described the issue as "one of first impression"). *Id.* at 1062.

We find the dicta in *Interstate Telephone* on the historic common law right of an employer "to recover for loss of services of his employe[e]" neither controlling nor persuasive here. First, that issue was not before the court. Second, and more important, the context there was an employee's *injury,* here it is death. This is a crucial distinction. Plaintiffs have failed to cite a single case permitting an employer to assert the same common law cause of action after the death of an employee that the employer would have enjoyed in the context of injuries to that

employee. Courts have uniformly described such causes of action arising from the death of an employee as wrongful death actions, and barred employers from bringing those claims because employers are not enumerated statutory beneficiaries in wrongful death actions.

Plaintiffs offer the *Hercules Powder* case as the means to leap the distinction between injury and death. But their reliance on *Hercules Powder* is misplaced. Plaintiffs cite the following passage from that case as supporting their cause of action:

> Of course, an *employer* or his subrogee is *free to maintain any primary cause of action which the employer may have directly in his own right* against another, specifically against the seller of an article for the breach of a warranty of its fitness for a particular use, known to the seller, which breach proximately results, inter alia, in injury to or the *death of the purchaser's employee*. Nevertheless the damages recoverable for such breach may not include the compensation payments made pursuant to our Workmen's Compensation Act, which statute provides the exclusive remedy for such recovery.

4 N.J. at 167, 72 A.2d at 196 (emphasis added). Defendants respond first that, while plaintiffs allege breach of warranty, as in *Hercules*, plaintiffs do not have that claim directly in their own right as a primary cause of action, because plaintiffs were not the purchasers of the 109 helicopter that crashed. Second, even if plaintiffs did have a breach of warranty claim here, under *Hercules* their damages could not include workmen's compensation payments. DSB at 7. *See also Multiplex Concrete Co. v. Besser Co.*, 153 N.J. Super. 531, 533, 380 A.2d 708, 710

(1977), *certif. den.*, 75 N.J. 607, 384 A.2d 837 (1978) (where employee killed because of defect in machinery purchased by employer, action to recover workers' compensation payments "not a primary cause of action which the employer has directly in its own right").

Plaintiffs do not argue that they were the purchasers of the subject 109 helicopter. However, under Count V they "are proceeding against defendants for breach of their implied warranty that the helicopter was fit for its particular and intended purposes – that is, safe flight." PSB at 4. Plaintiffs argue that "New Jersey courts have extended this warranty protection, in the absence of privity, to situations beyond those contemplated in the Uniform Commercial Code, including claims for economic loss." *Id.*

Plaintiffs rely on *Fashion Novelty Corp. v. Cocker Machine & Foundry Co.*, 331 F. Supp. 960, 965 (D.N.J. 1971) to establish their right under New Jersey law to bring a breach of warranty claim, even though they were not the purchasers of the helicopter. That court held:

> Reviewing the state decisional law of New Jersey, there emerges in bold relief the now well settled principle that the New Jersey courts have extended warranty protection – in the absence of privity – to classes of persons and to transactions well beyond those comprehended by the Uniform Commercial Code. More specifically, damages for breach of warranty are now recoverable by an *ultimate user* who has sustained property damage and economic loss; and who has come into possession of the defective goods by means other than by sale and purchase.

Id. (citation omitted; emphasis added). The court found "nothing to indicate that [the aggrieved party] United's use of the allegedly defective equipment is by virtue of any other than lawful possession, [and therefore] United stands a user entitled to the relief afforded by the law of New Jersey for breach of implied warranties, and this irrespective of any lack of privity between United and defendant." *Id.*, 331 F. Supp. at 966. However, unlike the "ultimate consumer" who was in possession of the defective product in *Fashion Novelty*, here the Trump organization was not in possession of the subject helicopter, but merely had made arrangements to have three of its executives be passengers at the time of the crash.

The court's reasoning in *Newmark v. Gimbel's Inc.*, 54 N.J. 585, 258 A.2d 697 (1969) at first appears more closely analogous to the facts here. There, the Court held:

> One, who in the regular course of a business sells or applies a product (in the sense of the sales-service hybrid transaction involved in the present case [where a beauty parlor patron was injured by a permanent wave solution]) which is in such a dangerously defective condition as to cause physical harm to the consumer-patron, is liable for the harm. Consumption in this connection includes all ultimate uses for which the product is intended.

Id., 54 N.J. at 595, 258 A.2d at 702. The court described the transaction there as "a hybrid partaking of incidents of a sale and a service. It is really partly the rendering of a service, and partly the supplying of goods for a consideration." *Id.*, 54 N.J. at 593, 258 F. Supp. at 701. The court

found that both the beauty parlor operator and manufacturer were liable.

Here, to describe the Trump organization as the "ultimate consumer" of the subject helicopter is superficially analogous to the *Newmark* case, since conveyance of passengers certainly fits within "all ultimate uses for which the product [was] intended." But can Trump be said to be the "ultimate consumer" of those services, or rather does that term fit only the actual passengers aboard the helicopter? In *Newmark* the plaintiff sued over injuries she personally received. Here plaintiffs are one step removed from what is admittedly not a sales transaction at all, but entirely a service. (Unlike the permanent wave solution, which was totally consumed in the performance of the service in *Newmark* – hence the "hybrid" nature of the transaction – the passenger service offered here cannot be said to have been "the supplying of goods for a consideration"). The analogy to *Newmark* breaks down because there is no aspect of a sale in this case, and the Trump organization was not injured directly, but only as a result of the death of its employees, for whom the service was performed.

This case can be distinguished from all the above cases. In *Hercules* the court found that the employer had a cause of action in its own right because it was the purchaser of the defective product that injured its employee. The product had been purchased by the employer and was in the employer's possession. Not so here. And in those cases which have extended implied warranties beyond the scope of "the traditional sales transaction," the aggrieved party has had possession of the allegedly defective product; or where the transaction was largely

service-related, but still had a sales component, the case involved the party actually injured by the service/consumption of the product. Not so here.

B. *People Express* Is Inapposite Because This Case Does Not Involve Purely Economic Damages

The *People Express* Court wrote that New Jersey law must "strive to ensure that the fundamental application of negligence doctrine advances the fundamental purpose of tort law and does not unnecessarily or arbitrarily foreclose redress based on formalism or technicalisms." 100 N.J. at 255, 495 A.2d at 111. Plaintiffs argue that this means we should not "abandon precedent of longstanding application which is consonant with fundamental precepts of tort law," and so should permit their cause of action. PB at 21. Because "the overarching purpose of tort law [is] that wronged persons should be compensated for their injuries and that those responsible for the wrong should bear the cost of their tortious conduct," 495 A.2d at 111, the court should not bar plaintiffs from recovering for losses they sustained as a result of the death of their employees.

While the above language from *People Express* would seem at first to support plaintiffs' cause of action, plaintiffs' argument here does not survive close inspection. *People Express* addressed the question "whether a defendant's negligent conduct that interferes with a plaintiff's business resulting in purely economic losses, *unaccompanied by property damage or personal injury,* is compensable in tort." 495 A.2d at 108 (emphasis added). Factually,

therefore, *People Express* is completely inapposite to this case. That case involved recovery for purely economic damages in the absence of "physical harm" – either property damage or personal injury. *People Express* sought to recover business interruption damages that arose when the company was required to shut down its Newark terminal for 12 hours because of a tank car fire at a nearby Conrail yard. Here, however, we confront the allegation of economic damages *resulting from* personal injury – the death of plaintiffs' employees. This, then, is not the pure case of economic damages in isolation from personal injury, but economic damages arising exclusively from personal injury, an issue not before the *People Express* Court.

People Express arose in the context of an inadequately defined area of tort law where no remedy for the wrong suffered had yet been adopted in this state. The Court considered the inequities of a *per se* rule barring recovery for economic damages in the absence of either personal injury or property damage and constructed a narrow standard permitting the award of such damages. While recognizing that such damages were already available in a few specific circumstances, the court set forth a general standard under the "principle of particular foreseeability." 495 A.2d at 116. We need not elaborate that standard here, for it is inapplicable to the facts of this case. It is because the economic damages arise from the death of plaintiffs' employees that this case is a wrongful death action, and not a *People Express* pure economic damages claim. As discussed below, the legislature set the parameters of those entitled to recover for economic

damages arising from wrongful death, and plaintiffs simply are not so entitled.

2. The New Jersey Wrongful Death Statute Bars Plaintiffs From Recovering Damages Here

Defendants argue that plaintiffs' claims are a masquerade for what is at bottom a wrongful death action, for which plaintiffs may not recover. The New Jersey wrongful death statute provides, in pertinent part:

> The amount recovered in proceedings under this chapter shall be for the *exclusive benefit of the persons entitled to take any intestate personal property of the decedent,* and in the proportions in which they are entitled to take the same.

N.J.S.A. 2A:31-4 (emphasis added). No action lies in New Jersey for the death of another except by force of this statute. *See Turon v. J. & L. Const. Co.*, 8 N.J. 543, 558 (1952):

> the pecuniary loss ensuing from the death to others than the designated beneficiaries are not recoverable [under the statute]. A cause of action is created in favor of the persons thus designated, and if there be none such, there can be no recovery. It is their pecuniary injury that is to be recompensed, not the loss suffered by persons outside of the beneficiary class. . . . [T]he terms definitive of the persons or classes of persons for whom the remedy is provided are not to be expanded beyond their fair intendment.

Id. Defendants argue that "the Trump plaintiffs are not the 'fair intendment' and are improperly requesting the

Court to expand the class of beneficiaries who may recover for wrongful death beyond the exclusive terms specified in the New Jersey wrongful death statute." DB at 11. We agree that plaintiffs are not the intended beneficiaries specified by the statute.

The law is well settled as to economic damages arising from wrongful death – only statutory beneficiaries may recover such damages. The concern "that wronged persons should be compensated for their injuries and that those responsible for the wrong should bear the cost of their tortious conduct," 495 A.2d at 111, was reconciled by the legislature long ago. The legislature declared that the universe of wronged persons entitled to recover for wrongful death does not include employers. Thus, although plaintiffs did suffer purely economic damages, they are barred from recovery for those damages because inescapably those damages are rooted in the death of their employees and only statutory beneficiaries may recover for wrongful death.

A. Plaintiffs Have Asserted a Wrongful Death Action

Plaintiffs reject comparison of their claims to a wrongful death action. "In a nutshell, the Trump plaintiffs are not attempting to recover wrongful death damages, but seek instead to recover for the massive economic losses, including lost profits, sustained as the result of the Agusta defendants' tortious misconduct." P.B. at 14-15. Moreover, plaintiffs argue, the cases from other jurisdictions that bar recovery by an employer for damages arising from *injuries* to their employees have

done so in the context of negligent injury, and not the intentional misconduct alleged here. *Id.* at 15. (Plaintiffs do not address whether the distinction between negligent and intentional injury survives the death of the employee, but we conclude that it does not.)

Plaintiffs address the distinction between injury and death only cursorily. They reject the importance of the distinction by arguing that their cause of action is not governed by the New Jersey wrongful death statute, but rather derives from the contractual relationship to their deceased employees:

> The [wrongful death] statute designates certain beneficiaries who are to recover by virtue of their familial relationship to the deceased. *See* N.J.S.A. 2A:31-4 (West 1987). The Trump plaintiffs' claims, on the other hand, are not based on social status but on their contractual relations to the deceased employees. Although it has been said [and held] that a master cannot recover for lost services because an expectation of services ends when the servant dies, the Trump plaintiffs' contractual obligations to the decedents did not end with the fiery helicopter crash in Lacey Township. The plaintiffs have been required to make salary and workers compensation payments under the terms of the respective employment agreements without having the continued benefit of the services of these highly valued executives. Because plaintiffs' claims arise by virtue of contract and not by operation of law, this argument [that the wrongful death statute controls this case] should be disregarded.

PB at 22 (citation omitted). Plaintiffs argue that their claim is not a wrongful death action because their link to their employees is contractual, not familial. Plaintiffs here attempt to transform what is a bar to their recovery into the means to redefine their claim and so avoid the bar. However, that they do not have the statutorily mandated link to the deceased which would entitle them to recover under the wrongful death statute does not alter the fact that this action is grounded in the allegedly wrongful death of their employees. Plaintiffs' "contractual obligations" – salary and worker's compensation payments – along with their damages, all arose from the ashes of "that fiery helicopter crash" that killed their employees. However described by plaintiffs, this is a wrongful death action.

As defendants point out, merely because the complaint does not "allege a cause of action for wrongful death does not alter the fact that these claims are brought to recover damages sustained by reason of the death of the employees." DB at 5. *See Western Goals v. Union of Soviet Socialist Republics (U.S.S.R.)*, MDL No. 565, Misc. No. 83-0345, Docket No. 83-8399 (D.D.C. Feb. 25, 1985):

> The plain meaning of a wrongful death action is a claim brought to recover pecuniary losses occasioned upon death tortiously caused by a third party. It is the means by which the burden of loss is shifted, as much as possible, from the innocent survivors to the responsible party. Plaintiffs[']action presents precisely such a claim and is a wrongful death action.

Western Goals, slip op. at 4.

Many courts have considered the issue and held uniformly that an employer has no cause of action for damages arising from the wrongful death of an employee. This is so because the right to recover for the wrongful death of another is exclusively statutory. *See, e.g., Harris Corp., Data Communications Division v. Comair, Inc.*, 510 F. Supp. 1168, 1170 (E.D. Ky. 1981) ("actions for wrongful death, since they did not exist at common law, are solely the creatures of statutory or constitutional provisions"), *aff'd*, 712 F.2d 1069 (6th Cir. 1983); *Preiser Scientific. Inc. v. Piedmont Aviation, Inc.*, 432 F.2d 1002 (4th Cir. 1970), *cert. denied*, 401 U.S. 1009 (1971) (affirming district court's dismissal of complaint seeking damages for loss of services of employee killed in crash of defendant's airplane, since corporation had no cause of action arising from death of its employee under common law or West Virginia statute); *Arrow Electronics, Inc. v. Stouffer Corp.*, 117 Misc. 2d 554, 458 N.Y.S.2d 461 (Sup. Ct. 1982); Anno., Employer's Right of Action for Loss of Services or Like Against Third Person Tortiously Killing or Injuring Employee, 4 A.L.R. 4th 504 (1981).

In *Arrow Electronics*, 13 employees of Arrow perished in a 1982 hotel fire and the corporation sued for damages arising from, among other things, lost profits, loss of management and the costs of recruiting new management (damages similar to those alleged here). The court dismissed the complaint after concluding that the right to recover for the wrongful death of another is governed exclusively by wrongful death statutes under which corporations are not designated statutory beneficiaries. The court rejected an argument similar to that made by plaintiffs here:

> Plaintiff urges that this is not a wrongful death action but an action for injury to the corporate plaintiff. However, this is, no matter how ingeniously disguised, a wrongful death action.

Id., 458 N.Y.S.2d at 463.

In *Harris*, the court held that a corporation may not recover damages sustained when an employee dies in an aircraft accident, regardless of how the claim is pleaded:

> The problem with the plaintiff's death claim is that it is well established that actions for wrongful death, since they did not exist at common law, are solely the creatures of statutory or constitutional provisions.

Harris, 510 F. Supp. at 1170 (footnotes omitted).

Thus, plaintiffs' wrongful death claims are barred.

c) Count VI – Wilful Destruction and Spoilation of Evidence and Breach of Agreement to Preserve Trial Evidence and Fraud

Plaintiffs concede that New Jersey has yet to recognize the "evolving tort" set forth in Count VI. They urge the court, however, to permit them to go forward with their claim, on the basis that New Jersey tort law is progressive. "It is certainly likely . . . that New Jersey courts would permit a cause of action sounding in tortious spoilation of evidence, particularly where plaintiffs have a valuable probable expectancy in the prospective litigation, which expectancy has been severely diminished by defendants' destruction of evidence." PB at 31. We decline plaintiffs' invitation to create a new cause of action, believing that role is better suited to New Jersey

state courts. Therefore, we need not set forth the facts upon which this claim is based. The claim will be dismissed.

d) Count VIII – Willful. Intentional Interference With Contractual Employment Relations

Agusta moves to dismiss Count VIII under Rule 12(b)(6). In support of this claim the complaint states the following:

> 94. Long prior to October 10, 1989, the Defendants knew that the unreliability as a result of manufacturing and design defects in the main rotor blades, unless corrected, was going to result in a catastrophic blade failure and loss of the helicopter at some time in the future.
>
> 95. The Agusta Defendants knew, as a result of the prior failure in another helicopter in virtually the same spot as the accident helicopter[,] as well as other failures in other rotor blades well below their design life limit, that it was likely that a main rotor blade failure would occur in-flight, which had an extreme likelihood of serious personal injury or death to the helicopter occupants.
>
> 96. The Agusta Defendants knew with certainty that unless the helicopter rotor blades were changed or that eddy current inspections or other tests were performed on a regular short term basis, cracks would develop from the inside of the rotor blades out or vice versa and that sudden, unanticipatable rotor blade failure would occur, resulting in serious personal injury or death.

> 97. In spite of that knowledge, and with a high degree of probability that a main rotor blade failure would occur and would result in serious personal injury or death, the Agusta Defendants did intentionally, deliberately, and without hesitation expose[] the Plaintiffs' employees to physical and emotional harm, resulting in a harmful and offensive contact to their persons.
>
> 98. The Agusta Defendants had reason to know that such injuries and death would inevitably result to employees of businesses that regularly chartered the helicopter and for which role such helicopters were regularly sold and promoted for sale and use, and that their death would result in damage to their employers' businesses.
>
> 99. The willful conduct of the Defendants had as its practical effect the intentional and wanton interference with the employee relations between Plaintiffs and their employees, entitling the Plaintiffs to punitive damages.

Compl. ¶¶94-99.

"[T]he bare elements of the tort of malicious interference with contractual relations are actual interference with a contract plus proof of the malicious nature of that interference." *Norwood Easthill Associates v. Norwood Easthill Watch*, 222 N.J. Super. 378, 536 A.2d 1317, 1320 (A.D. 1988), *citing Raymond v. Cregar*, 38 N.J. 472, 479-80 (1962). "Malice in the legal sense is the intentional doing of a wrongful act without justification or excuse. And a 'wrongful act' is any act which in the ordinary course will infringe upon the rights of another to his damage, except it be done in the exercise of an equal or superior right."

Louis Schlesinger Co. v. Rice, 4 N.J. 169, 72 A.2d 197, 203 (1950).

> Merely to persuade a person to break his contract may not be wrongful "in law or in fact"; but if "the persuasion be used for the indirect purpose of injuring the plaintiff, or of benefiting the defendant, at the expense of the plaintiff, it is a malicious act, which is in law and in fact a wrong act, and therefore a wrongful act, and therefore an actionable act if injury ensues from it."

Id. (citation omitted). The parties agree that "[t]his cause of action requires that the plaintiffs establish that the conduct of the defendants was wanton, malicious, and unjustifiable." PB at 23; DB at 15-16; *Kurtz v. Oremland*, 33 N.J. Super. 443, 455, 111 A.2d 100, *aff'd*, 16 N.J. 454 (1954).

Defendants argue that "[t]he requisite elements of malice and intention are not present in this case. There is no allegation that the Agusta defendants knew on October 10, 1989 that plaintiff's employees would be on board an Agusta helicopter and it would be preposterous to suggest that the Agusta defendants had any knowledge of the employment terms between the Trump plaintiffs and the decedents." DB at 16. (We note that under *Schlesinger*, intention is part of malice.)

Plaintiffs respond: "The issue here is not whether plaintiffs can prove at trial whether the Agusta defendants knew of the Trump plaintiffs' contractual relationship with the decedents, but whether plaintiffs have pleaded a legally sufficient cause of action." PB at 24. Plaintiffs argue that discovery will enable them to establish "that the Agusta defendants knew that the inevitable

and proximate result of their failure to take action would be personal injury or death" among an "exclusive and limited audience" of "corporate and V.I.P." customers, and plaintiffs' deceased executives were of that class. *Id.*

In other words, Agusta knew: (1) a helicopter blade would fail on one or more of its A109 helicopters; (2) because of that failure a helicopter would crash; (3) the crash would injure someone; (4) the injured person probably would be a corporate executive, a victim of Agusta's marketing. But there is no allegation that Agusta knew that any of plaintiffs' employees might possibly be injured, much less that Agusta intended thereby to injure plaintiffs.

Plaintiffs assert that they have alleged malice: "the Agusta defendants promoted and marketed the A109 as safe for executive use, notwithstanding their actual knowledge of the dangers inherent in its manufacture which made the helicopter unairworthy and unfit for flight as represented. Despite this actual knowledge and solely for their own pecuniary benefit, the Agusta defendants were silent when there was duty to speak. It is this deliberate silence, and not any mistake or inadvertence, which constitutes malice, and forms the predicate for plaintiffs' theory of recovery." PB at 26.

This is merely a statement of general malice, if you will, not in the least directed at the contractual relationship between plaintiffs' and their deceased executives, the focus of the claim of malicious interference. The type of malice to be demonstrated must be against plaintiffs, not the entire corporate world. Malice is specific, not

general. And as it pertains to interference with a contractual relationship, it must be specific to that contract. Yet there is no allegation in the complaint that Agusta was aware of the contractual relationship between plaintiffs' and their deceased executives, nor even that Agusta was aware that plaintiffs used the services of an Agusta A109 helicopter, and so were potentially exposed to injury.

> It is a simple proposition that a person cannot intentionally interfere with a contract that he knows nothing about. In order to subject someone to liability under this tort, the individual must have knowledge of the contract with which he has allegedly interfered. Restatement of Torts (Second) § 766, comment i (1977).

Major League Baseball Promotion Corp. v. Colour-Tex. Inc., 729 F. Supp. 1035, 1051 (D.N.J. 1990). The complaint fails to allege that Agusta had such knowledge. Plaintiffs therefore have failed to state a claim for "willful, intentional interference with contractual employment relations" and Count VIII of the complaint will be dismissed.[4]

---

[4] Plaintiffs argue that should the court conclude that the "allegations in the Trump plaintiffs' complaint do not fit neatly into the confines of the [above] tort," the court has a "duty under Rule 12(b)(6) to examine the complaint to see if it provides a basis for relief under any possible theory, even if the allegations do not necessarily support the particular legal theory advanced." PB at 24. We are unable to construct a claim from the allegations of Count VIII.

IV. CONCLUSION

For the foregoing reasons, we will deny plaintiffs' motion to remand, grant summary judgment for defendants on plaintiffs' claim for reimbursement of worker's compensation benefits, and dismiss plaintiffs' damages claims as set forth in the eight counts of the complaint.

An appropriate order will be entered.

/s/ John F. Gerry
JOHN F. GERRY, CHIEF JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

TRUMP TAJ MAHAL ASSOCIATES, A Limited Partnership, TRUMP CASTLE ASSOCIATES, TRUMP PLAZA ASSOCIATES, and HELICOPTER AIR SERVICES, INC.	:	Civil Action No. 90-3245(JFG)
Plaintiffs,	:	
v.	:	ORDER
COSTRUZIONI AERONAUTICHE GIOVANNI AGUSTA, S.p.A., AGUSTA S.p.A., GRUPPO AGUSTA, AGUSTA AVIATION CORPORATION, a/k/a Agusta Aerospace, and PARAMOUNT AVIATION, INC.	:	(Filed Apr. 11, 1991)
Defendants.	:	

This matter having come before the Court on motions by plaintiffs' to remand and defendants to dismiss; and

For the reasons set forth in the Court's opinion filed this day; and

For good cause shown;

It is on this 11th day of April, 1991 hereby ORDERED that plaintiffs' motion to remand is DENIED.

It is FURTHER ORDERED that defendants' motion for summary judgment on plaintiffs' claim for reimbursement of worker's compensation benefits is GRANTED;

It is FURTHER ORDERED that defendants' motion to dismiss the complaint is granted.

/s/ John F. Gerry
JOHN F. GERRY, CHIEF JUDGE
UNITED STATES DISTRICT COURT

STATUTES INVOLVED

Section 1441 of the Judiciary and Judicial Procedure Code provides, in pertinent part:

> (d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

28 U.S.C. § 1441(d).

Section 1603 of the Judiciary and Judicial Procedure Code provides, in pertinent part:

> For purposes of this chapter –
>
> (a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An "agency or instrumentality of a foreign state" means any entity –
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603(a), (b).

(2)

No. 91-1986

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

TRUMP TAJ MAHAL ASSOCIATES, et al.,

Petitioners,

—v.—

COSTRUZIONI AERONAUTICHE GIOVANNI AGUSTA S.p.A., et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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**Counsel of Record*

QUESTIONS PRESENTED

1. Whether the indirect ownership of shares of a corporate manufacturer by a political subdivision satisfies the requirements of 28 U.S.C. § 1603(b)(2)?

2. Whether the Court of Appeals properly affirmed the District Court's dismissal of this action brought by an employer seeking to recover damages for the wrongful death of its employees?

RULE 29.1 LIST

1. AGUSTA AEROSPACE CORPORATION is a wholly owned subsidiary of AGUSTA S.p.A.

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IN THE

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RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, COSTRUZIONI AERONAUTICHE GIOVANNI AGUSTA S.p.A., AGUSTA S.p.A., GRUPPO AGUSTA and AGUSTA AEROSPACE CORPORATION (hereinafter Agusta defendants), respectfully request that the Court deny the petition for writ of certiorari, seeking review of the opinion and decision of the Court of Appeals for the Third Circuit affirming the District Court's denial of the motion to remand this action and the dismissal of this action for failure to state a claim upon which relief can be granted. That decision is reported, without published opinion, at 958 F.2d 365 (3d Cir. 1992) and is reprinted in the Appendix to the Petition.[1]

1 References to the Appendix to the Petition appear as "Pet. App."

STATEMENT OF THE CASE

1. The Nature of the Case

This action arises from the death of three passengers who were killed when an Agusta A109 helicopter crashed in Lacey Township, New Jersey on October 10, 1989. The action was commenced by three New Jersey partnerships who allegedly employed the decedents at the time of their death. Those partnerships, Trump Taj Mahal Associates, Trump Castle Associates and Trump Plaza Associates (hereinafter Trump) are engaged in the business of casino operations in Atlantic City, New Jersey.[2]

Trump filed a complaint in the Superior Court of New Jersey seeking to recover financial losses allegedly sustained as a consequence of the death of its employees. On August 10, 1990, Agusta S.p.A. filed a notice of removal to the United States District Court for the District of New Jersey based on Agusta S.p.A.'s status as a foreign state under the Foreign Sovereign Immunities Act (hereinafter FSIA). The Agusta defendants simultaneously filed a motion to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

2. The Opinion of the District Court

In its opinion and order, dated April 11, 1991, the district court denied Trump's motion for remand holding that the Italian government owned Agusta S.p.A. in the manner contemplated by the FSIA (Pet. App. 19a-23a). In dismissing the common law claims for economic losses, the district court held:

> 1. Trump was asserting a wrongful death action and the New Jersey wrongful death statute precluded employers from recovering for financial losses sustained as a result

---

2 A claim was also asserted by Helicopter Air Services, Inc. for diminution in the value of an unrelated Agusta A109 helicopter as a result of the accident.

of the loss of services of its employees (Pet. App. 47a-48a);

2. Only those beneficiaries enumerated under the New Jersey wrongful death statute were entitled to seek economic damages arising from wrongful death (Pet. App. 48a);

3. New Jersey common law does not confer upon employers a right of recovery for financial losses stemming from the death of their employees (Pet. App. 38a).

3. The Opinion of the Court of Appeals

Following oral argument and upon due consideration of the issues presented, the Third Circuit affirmed the decision of the district court in all respects. The court addressed the issue of whether the indirect ownership of the shares of the corporate aircraft manufacturer by the Italian government sanctioned removal of the action to federal court under the FSIA. The Third Circuit concluded this to be the case and also noted that the language and legislative history of 28 U.S.C. § 1441(d) demonstrated clear Congressional intent that the entire action be removed under the doctrine of pendent jurisdiction (Pet. App. 4a).

The Third Circuit also affirmed the decision of the District Court dismissing Trump's claims for economic losses on the grounds that an employer cannot recover for losses occasioned by the death of an employee. The court properly recognized that the language and purpose of the New Jersey wrongful statute was controlling as to those entitled to bring a claim for wrongful death (Pet. App. 5a).

A petition for rehearing was denied on March 12, 1992.

REASONS WHY THE PETITION SHOULD BE DENIED

There is no justifiable basis for the Court to grant this Petition for Certiorari. The Third Circuit, in holding that Agusta S.p.A. qualifies as a foreign state, reached a decision consistent with every federal court decision on this issue. As there is no conflict among the federal courts with respect to this issue, the standard of review by this Court has not been met and, therefore, the Petition should be denied.

Further, the Third Circuit conducted a *de novo* review all relevant authority and reached a determination as to how the Supreme Court of New Jersey would have ruled in this case. The Third Circuit conducted an appropriate review of the issues of state law and, therefore, there is nothing for this Court to review.

I

THE TRIAL COURT PROPERLY DENIED THE MOTION FOR REMAND AND FOR STAY OF PROCEEDINGS

The decisions of the courts below finding that Agusta S.p.A. is a "foreign state" within the meaning of § 1603(b) of the Foreign Sovereign Immunities Act (FSIA) are entirely consistent with prior federal court decisions interpreting the language and intent of the statute and are amply supported by the undisputed facts of this case. The decisions relied upon by the courts below are not in conflict with any federal court decisions on this issue.

Petitioners do not dispute the chain of ownership between the Italian governmental agency, Ente Partecipazioni e Finanziamento Industria Manufatturiera (EFIM) and Agusta S.p.A. The purpose of EFIM is to own, manage, supervise and control business sectors essential to the national interest, including the aerospace industry.

In an attempt to create an issue of construction where none exists, petitioners seek to impose an artificially restrictive definition of "ownership interest." In that attempt, petitioners misstate the statutory language of 28 U.S.C. § 1603(b)(2). This section requires a majority ownership of shares or "other ownership interest." There is no requirement, implicit or otherwise, that the ownership be direct as petitioners contend.

Section 1603(b)(2) expressly recognizes alternate forms of ownership, a fact which is controlling on the issue of Agusta's status as a foreign state. The decisions addressing this provision, although few, are consistent and in keeping with the legislative history of the statute. In *O'Connell Machinery Co., Inc. v. M.V. "Americana"*, 734 F.2d 115 (2d Cir. 1984), *cert. denied*, 469 U.S. 1086 (1984) the United States Court of Appeals for the Second Circuit found the legislative history which provides that political subdivisions were intended to include "all governmental units beneath the central government" to be controlling. *Id.* at 116 (citing H.R. Rep. No. 1487, 94th Cong., 2d Sess. 15, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6604, 6613).

Other courts have similarly construed the definition of "ownership interest" under section 1603(b)(2) as "designed to establish the degree of the foreign state's *identification* with the entity under consideration." *Yessenin-Volpin v. Novosti Press Agency*, 443 F. Supp. 849, 852 (S.D.N.Y. 1978) (emphasis added); *see also Outbound Maritime Corp. v. P.T Indonesesian Consort.*, 582 F. Supp. 1136, 1144 (D. Md. 1984); *see e.g. Erickson v. Alitalie Linee Aeree Italiane*, No. 90-3895 (D.N.J. June 5, 1990). The quality of the relationship between the foreign state and the entities at issue was the controlling factor in each of these cases, not the question of direct ownership of shares.

Petitioners also attempt to blur the distinction between Agusta S.p.A.'s status as a foreign state and the issue of pendent jurisdiction. Petitioners argue that the Third Circuit has extended the FSIA to encompass the activities of Agusta

S.p.A.'s subsidiary, Agusta Aerospace Corporation. This is simply not the case nor have respondents so argued. As with any other defendants that do not qualify under the FSIA, Agusta Aerospace Corporation is entitled to have the claims against it heard in federal court under the doctrine of pendent jurisdiction.

As there is no conflict among the federal courts having interpreted the subject provision of the FSIA, there is no issue for the Court to review.

II

THE COURT OF APPEALS CONDUCTED A PROPER REVIEW OF THE DISTRICT COURT DECISION

Petitioners argue that since the Third Circuit was in agreement with the conclusions reached by the district court and chose not to write a duplicative opinion, that an appropriate review was not conducted. On the contrary, the standard of review applied by the Third Circuit in this case was in accordance with this Court's decision in *Salve Regina College v. Russell*, 111 S.Ct. 1217 (1991).

In *Salve Regina College*, the United States Court of Appeals for the First Circuit based its decision on the "customary deference" accorded by that court to interpretations of state law made by the federal judges of that state. 111 S.Ct. at 1120. It was this plain and explicit error in review which formed the basis for this Court's remand of that case for further proceedings.

No such deference was afforded by the Third Circuit to the issues of the state law presented in this case. The opinion of the Third Circuit in this case clearly indicates that a *de novo* review was conducted by the court:

> At the threshold, *we confront the question* of whether the removal of this action by a corporate aircraft manufacturer . . . was proper pursuant to 28 U.S.C. § 1441(d) (West

> Supp. 1991). If so, *we must also decide* whether the district court had pendent jurisdiction . . . *We conclude* that the Italian government's indirect ownership of Agusta S.p.A. sanctions removal from state to federal court.

(Pet. App. 4a) (emphasis added).

There are simply no grounds to support the petitioners' conclusion that the basis for the Third Circuit's decision was deference to the district court determination. Accordingly, there is nothing for the Court to review.

III

THE ISSUES OF STATE LAW WERE FULLY ADDRESSED AND DETERMINED BY THE COURT BELOW

It is the holding of *Erie Railroad Company v. Tompkins*, 58 S.Ct. 817 (1938) and its progeny that each federal court functions as a proxy for the state courts and therefore must apply the law as it conscientiously believes would have been applied by the highest court of the state. The ultimate goal is to achieve uniformity of result independent of whether a case is brought in state or in federal court. *See Guaranty Trust Co. of New York v. York*, 65 S.Ct. 1464, 1469-70 (1945). In affirming the decision of the district court, the Third Circuit thoroughly considered the relevant authority before it in this case and reached a decision based upon a proper application of the law of New Jersey.

Petitioners erroneously argue that the Third Circuit disregarded New Jersey Supreme Court decisions from 1914 and 1950 which they claim have remained undisturbed. Yet, as recently as 1981, it has been held by the Supreme Court of New Jersey that no action lies for the death of another except as provided in the New Jersey wrongful death statute. *Alfone v. Sarno*, 87 N.J. 99, 432 A.2d 857 (1981); *see also*

Cooper v. Shore Electric Co., 63 N.J.L. 558, 44 A. 633 (1899). The classes of beneficiaries specified in the New Jersey wrongful death statute are exclusive and the statute may not be expanded beyond its terms. *Turon v. J. & L. Construction Co.*, 8 N.J. 543, 86 A.2d 192 (1952). In the words of the New Jersey Supreme Court:

> A cause of action is created in favor of the persons thus designated, if there be none such, there can be no recovery. It is their pecuniary injury that is to be recompensed, not the loss suffered by the persons outside of the beneficiary class.
>
> * * *
>
> Being remedial in nature, the statute is to be liberally construed and applied to effectuate its beneficent object. . . *But the act is in derogation of the common law*; and the terms definitive of the persons or classes of persons for whom the remedy is provided are not to be expanded beyond their fair intendment.

86 A.2d at 199 (citations omitted and emphasis added).

The Third Circuit correctly determined that Trump, as the employer, was not a designated beneficiary and that the language and purpose of the New Jersey wrongful death statute was controlling on the issue of petitioners' wrongful death claim. The court's finding was also consistent with the decisions of every jurisdiction in this country which has considered the issue.

In reaching its decision, the Third Circuit carefully considered the authority cited by petitioners. However, it determined *Interstate Telephone & Telegraph Co. v. Public Service Electric Co.*, 86 N.J.L. 26, 90 A. 1062 (1914) was readily distinguishable as that case did not involve the wrongful *death* of an employee. The passing comment of the court with respect to an employer's right to recover for loss of services is no longer of any effect given the *Alfone* and *Turon* decisions and the language of the wrongful death statute.

The court also properly rejected *U.S. Casualty Co. v. Hercules Powder Co.*, 4 N.J. 157, 72 A.2d 190 (1950), as Trump did not have a breach of warranty right to assert in its own right. *Hercules* does not stand, as petitioners suggest, for the proposition that an employer has an unfettered right to recover economic losses for injuries sustained by its employees.

Petitioners attempt to convince the Court that there is a conflict among the decisions in New Jersey on the issue of an employer's right to recover for the wrongful death of its employees. This is simply not the case as amply demonstrated to the lower courts. The Third Circuit reached the only conclusion supported by the relevant authority and pleadings before it and correctly dismissed petitioners' claim for wrongful death.

As a last alternative, petitioners argue that the Third Circuit failed to give proper credence to intermediate court decisions regarding Trump's claim for reimbursement of worker's compensation benefits. This argument is premised, however, upon a misstatement of the holdings in those cases. In each case, written notice was given within the statutorily prescribed period.

IV

THE COURT FOUND AMPLE BASIS ON WHICH TO BASE ITS DECISION THAT AN EMPLOYER CANNOT RECOVER FOR THE WRONGFUL DEATH OF AN EMPLOYEE

Petitioners erroneously argue that the Third Circuit had inadequate grounds upon which to base its decision and, therefore, the matter should have been remitted to the state court. This assertion is wholly unsubstantiated as discussed more fully above and ignores the language and purpose of the FSIA.

In enacting the FSIA, Congress codified its intent that a foreign state be entitled to have claims against it heard in a federal forum. The alternative suggested by petitioners would require this Court disregard this intent and strip a foreign state of this statutory right. Further, federal courts are duty bound under the holding of *Erie* to decide, not evade, questions of state law. *Huddleston v. Dwyer*, 64 S.Ct. 1015, 1017-18 (1944).

Given these factors, the Third Circuit has carried out its duty in making a determination that an employer has no right to assert a common law claim for wrongful death in New Jersey. To have done otherwise in light of the clear authority presented to the court would have constituted a dereliction of its responsibility.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

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No. 91-1986

In The
Supreme Court of the United States
October Term, 1991

TRUMP TAJ MAHAL ASSOCIATES, et al.,
Petitioners,

v.

COSTRUZIONI AERONAUTICHE GIOVANNI AGUSTA S.p.A., et al.,
Respondents.

BRIEF OF RESPONDENT PARAMOUNT AVIATION CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CONSTRUZIONI AERONAUTICHE GIOVANNI AGUSTA S.p.A. et al.,

Respondents.

BRIEF IN OPPOSITION OF RESPONDENT PARAMOUNT AVIATION CORPORATION

Respondent Paramount Aviation Corporation ("Paramount") respectfully submits that this Court should deny the petition for a writ of certiorari because it presents no issue deserving the Court's attention under Supreme Court Rule 10. The petition seeks review of the unpublished opinion issued in this

case by the United States Court of Appeals for the Third Circuit. The Third Circuit's decision is noted at 958 F.2d 365 (3d Cir. 1992).

REASONS FOR DENYING THE PETITION

I. THE COURT OF APPEALS DECISION CONCERNING AGUSTA SpA'S STATUS AS AN AGENCY OR INSTRUMENTALITY OF A FOREIGN STATE IS CORRECT AND DOES NOT CONFLICT WITH DECISIONS OF ANY CIRCUIT COURT

Petitioners urge this Court to grant their petition for a writ of certiorari to address "a question of first impression before the Court concerning the parameters of section 1603(b) of the Foreign Sovereign Immunities Act, which defines an agency or instrumentality of a foreign state subject to the protections of that statute to include 'an organ of a foreign state or a political subdivision thereof, or [an entity where] a majority of shares or other ownership interest is owned by a foreign state or political subdivision thereof.' 28 U.S.C. § 1603(b)(2)." (Petition at 6) Petitioners have argued at each stage of these

proceedings that the mere indirect ownership of the Agusta respondents by the Italian government will not allow the respondents to be treated as agencies or instrumentalities of a foreign state for purposes of the Foreign Sovereign Immunities Act.

Petitioners characterize this issue as one of "paramount importance." The striking dearth of circuit court opinions on this issue, however, underscores the lack of any pressing question worthy of this Court's attention. Petitioners even acknowledge in their petition that "[f]ederal court decisions interpreting § 1603(b)(2) are few and far between," (Petition at p. 9) and cite only one other court of appeals decision on this issue. See *O'Connell Machinery Co. v. M.V. "Americana"*, 734 F.2d 115 (2d Cir.), cert. denied, 469 U.S. 1086 (1984).

Moreover, the Second Circuit's interpretation of § 1603(b)(2) in *O'Connell* is in accord with the Third Circuit's interpretation of that provision in this case. There is no need for this Court's review of the Third Circuit's decision below, then, because there is no conflict among the few circuits interpreting

§ 1603(b)(2) to include entities indirectly owned by a foreign state. The petition should therefore be denied.[1]

II. THIS CASE IS AN INAPPROPRIATE VEHICLE FOR CONSIDERATION OF PETITIONER'S STATE LAW WRONGFUL DEATH CLAIMS WHERE BOTH THE DISTRICT COURT AND THE COURT OF APPEALS FOUND NO VALID CAUSE OF ACTION

Petitioners attempt to paint the court of appeals' affirmance of the district court's dismissal of their state law wrongful death claims as reversible error worthy of review by this Court. The court of appeals, however, properly agreed with the district court in recognizing petitioners' claim as one for wrongful death and holding that the New Jersey wrongful death statute, N.J.S.A. 2A:31-4 (1991), will not recognize such a claim by an employer. (App. at

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1. Petitioners refer briefly in their statement of the case to their contention below that removal of this case was improper because there is no diversity between Paramount and petitioners. (Petition at 4-5). Petitioners do not argue this point in their petition as a reason for granting the writ, however.

5a; 47a) As respondents argued in the district and circuit courts below, and as those courts agreed, petitioners' claim for damages resulting from the loss of their employees is no more than a garden-variety wrongful death claim which petitioners are not permitted to bring under the New Jersey statute. The district court correctly held:

> although plaintiffs did suffer purely economic damages, they are barred from recovery for those damages because inescapably those damages are rooted in the death of their employees and only statutory beneficiaries may recover for wrongful death. (App. at 48a).

Likewise, both the district court and the court of appeals found *Interstate Telephone & Telegraph Co. v. Public Service Electric Co.*, 86 N.J.L. 26, 90 A. 1062 (Err. & App. 1914), and *United States Casualty Co. v. Hercules Powder Co.*, 4 N.J. 157, 72 A.2d 190 (1950), relied upon by petitioners, easily distinguishable. (App. at 4a-5a; 39a-42a)

Even if the decisions below were worthy of this Court's attention, which they are not, see Supreme

Court Rule 10, both courts were entirely correct in their holding on the state law issue before them, without regard to the subsidiary questions raised in the petition. This Court therefore need not reach those points, and the petition should be denied.

CONCLUSION

For the foregoing reasons, respondent Paramount Aviation Corporation respectfully requests that the petition for a writ of certiorari be denied.

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